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INDIANA UNIVERSITY
SCHOOL OF LAW–INDIANAPOLIS
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Volume 42 No. 3 2009

Indiana Law Review

Volume 42 2008-2009

INDIANA LAW REVIEW

(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

Indiana Law Review
Lawrence W. Inlow Hall
530 W. New York Street
Indianapolis, IN 46202-3225
(317) 274-4440

Subscriptions. Current subscription rates for an academic year are $30.00 (domestic mailing) and $35.00 (foreign mailing) for four issues. Unless the Business Office receives notice to the contrary, all subscriptions will be renewed automatically. ***Address changes must be received at least one month prior to publication to ensure prompt delivery and must include old and new address and the proper zip code.***

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POSTMASTER: Send address changes to INDIANA LAW REVIEW, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225.

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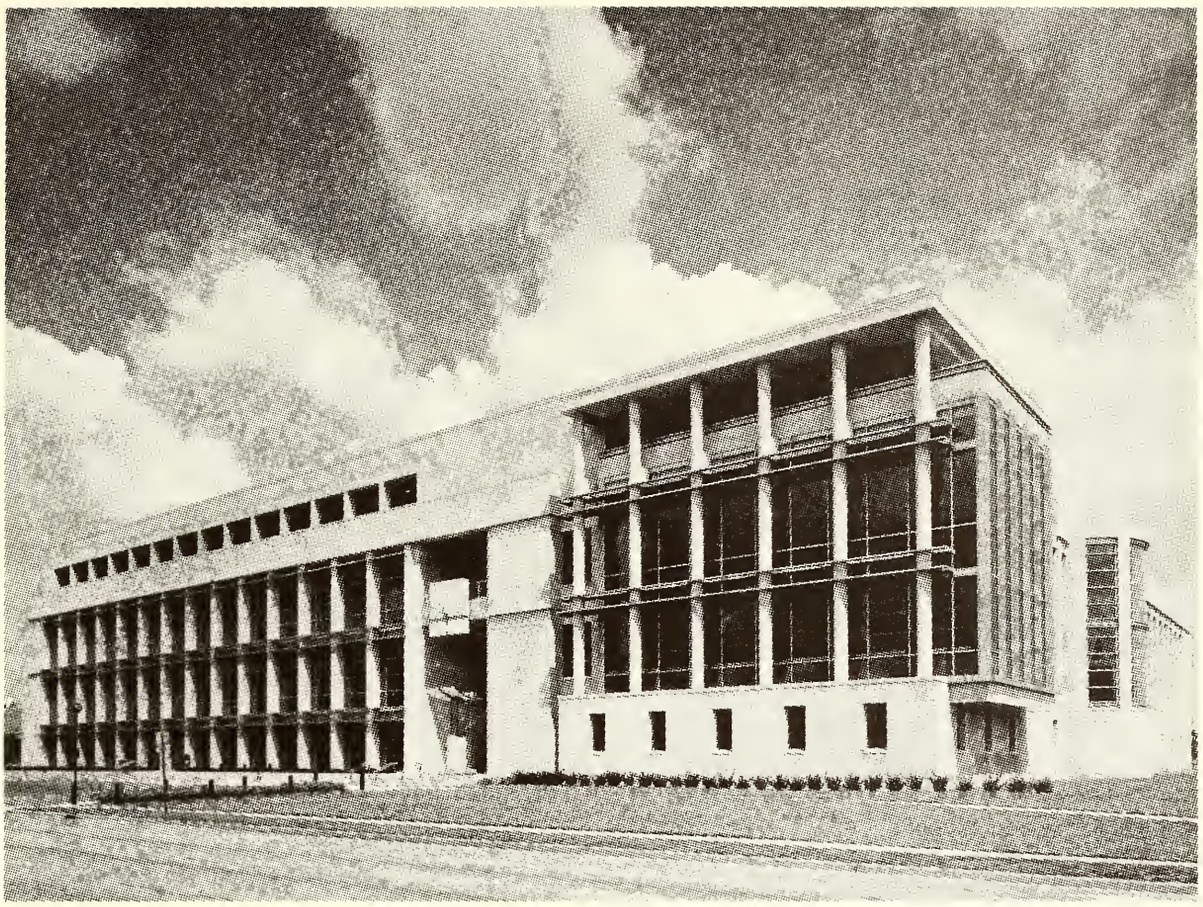

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SYMPOSIUM

JAZZING UP FAMILY LAW: THE FIRST ANNUAL MIDWEST FAMILY LAW CONFERENCE

JENNIFER ANN DROBAC*

Welcome to the first annual Midwest Family Law Conference[1] symposium issue. With this issue, the *Indiana Law Review* celebrates the work of forty scholars who gathered at the Crossroads of America,[2] both literally and figuratively, on June 13, 2008, to share their research on family law. Why were we jazzed? We chose the Friday before *Indy Jazz Fest*[3] to hold our conference for several reasons. First, this conference marked the inaugural meeting of the Midwest Family Law Consortium in the U.S. heartland—a region known to support families.[4] We were expecting to hear research reports and papers from some of

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* Professor of Law, Indiana University School of Law—Indianapolis. J.S.D., Stanford Law School, 2000. My sincerest gratitude to my jazz band of organizers: Amelia Deibert, Ryan Frey, Jonathan Hughes, Kelly Meier, and especially Ellen Hurley. Soloist Indiana University School of Law—Indianapolis staff who deserve recognition include: Elizabeth Allington, Sylvia Regalado, and Michelle Werner. Additional thanks to Miriam Murphy, Associate Director of our library, for her assistance. Finally, I am grateful for summer research stipends from Indiana University School of Law-Indianapolis that supported this work.

1. Founding members of The Midwest Family Law Consortium include: Professor June Carbone and her colleagues, Professors Barbara Glesner-Fines and Mary Kisthardt, at University of Missouri-Kansas City (UMKC), myself at Indiana University School of Law—Indianapolis, and Professor Nancy Ver Steegh, at William Mitchell School of Law. Indiana University School of Law—Indianapolis hosted the Inaugural Midwest Family Law Conference. William Mitchell will host the 2009 conference, and UMKC will host the 2010 conference. If you would like to join the band, let us know.

2. The National Park Service of the U.S. Department of the Interior refers to Indianapolis as the "Crossroads of America." *See* Nat'l Park Serv., U.S. Dep't of the Interior, The Capital at the Crossroads of America, http://www.nps.gov/history/nr/travel/indianapolis/introessay.htm (last visited July 8, 2009); *see also* David J. Bodenhamer & Randall T. Shepard, *The Narratives and Counternarratives of Indiana Legal History*, *in* THE HISTORY OF INDIANA LAW 3 (David J. Bodenhamer & Hon. Randall T. Shepard eds., 2006).

3. *See* Indy Jazz Fest, History of IJF, http://www.indyjazzfest.net/Legacy.html (last visited July 8, 2009) (providing overview of Indy Jazz Fest, an annual music festival held in Indianapolis, Indiana).

4. *See* Zack O'Malley Greenburg, *America's Best Places To Raise A Family*, FORBES MAGAZINE, June 30, 2008, *available at* http://www.forbes.com/2008/06/27/schools-places-family-

this nation's best family law scholars.[5] Consistent with the art form of jazz music, we wanted to improvise and experiment with different legal forms from various communities.[6] This Article introduces several of the papers presented during this conference, which are published in this volume.

Second, many Americans had been following the cases of the over 400 Fundamentalist Church of Latter Day Saints (FLDS) children removed from homes at the Yearning for Zion ranch.[7] We shared a common concern for all children, especially those in foster care systems across this nation, including those in Texas and Indiana. Thus, we looked forward to the keynote address by Judge James W. Payne, Director of Indiana Department of Child Services (DCS). This introduction gives highlights of that presentation. Third, many of us were excited because the following week, same-sex couples would be marrying (again) in California, following that state's supreme court decision, *In re Marriage Cases*.[8] We were jazzed for our gay and lesbian neighbors and wanted to hear more about the changing legal arrangement of marriage.[9] Finally, we wanted to

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forbeslife-cz_zg_0630realestate.html (ranking only Midwestern counties in its top five places to raise a family). Heartland Family Service, located in Omaha, Nebraska, is an example of a family-oriented service provider. *See* Heartland Family Service, http://www.heartlandfamilyservice.org/about/default.asp (last visited Mar. 13, 2009).

5. To obtain a copy of the conference program, see Inaugural Midwest Family Law Conference, Jazzing up Family Law, Conference Agenda, http://indylaw.indiana.edu/familylaw/jazzconf/agenda.cfm (last visited Mar. 13, 2009) [hereinafter Conference Agenda].

6. *See, e.g.*, ALYN SHIPTON, A NEW HISTORY OF JAZZ 4-5 (2d ed. 2007) (noting the improvisational nature of jazz music).

7. Martha Neil, *State Wrongly Removed 400 FLDS Kids, Texas Appeal Court Says*, A.B.A. J., http://www.abajournal.com/news/state_wrongly_removed_460_flds_kids_texas_appeals_court_says/ (May 22, 2008, 12:38 CDT).

8. *In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008) (holding that "the language of section 300 limiting the designation of marriage to a union 'between a man and a woman' is unconstitutional and must be stricken from the statute, and that the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples."), *superseded by const. amend.*, CAL. CONST. art. 1, § 7.5. After the conference, California voters overturned the law with Proposition 8, and the California Supreme Court upheld the Proposition as constitutional. *See generally* Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

9. *See* Tamara Audi et al., *California Set to Join Trend of Banning Gay Marriage*, WALL. ST. J., http://online.wsj.com/article/SB122594011478104085.html (Nov. 6, 2008); Tamara Audi et al., *California Votes for Prop 8*, WALL ST. J., http://online.wsj.com/article/SB122586056759900673.html?mod=special_page_campaign2008_mostpop (Nov. 5, 2008, 22:59 ET) [hereinafter Audi et al., *California Votes for Prop 8*] (noting that on November 4, 2008, California voters passed Proposition 8, which changed the California Constitution to recognize only heterosexual marriage). Opponents of Proposition 8 have since challenged its constitutionality and the effective popular rejection of the decision of *In re Marriage Cases*. *See, e.g.*, Maura Dolan & Jessica Garrison, *Battle Over Prop. 8 Goes To High Court*, L.A. TIMES, Nov. 20, 2008, n.p., *available at* http://articles.latimes.com/2008/nov/20/local/ me-prop8-supreme-court20. Just this year, the California Supreme Court upheld Proposition 8. *See generally Strauss*, 207 P.3d 48.

revisit our fellow Americans from the U.S. capital city of jazz, New Orleans, as they continue to recover from Katrina, and now from Gustav.[10] This introductory Article takes a look at the innovation and stasis in family law, its continuing failure to address the needs of our children and neighbors, and the issues which arise following a crisis.

In their book, *The History of Indiana Law*, David J. Bodenhamer and Randall T. Shepard explore the evolution of Indiana state law:

> The preferred narrative casts law as forward-looking or progressive. Law has enabled a polyglot society to meld and has provided both ballast and impetus to an economy that rapidly moved from agriculture to industry to service activities over a brief 150-year history. The counternarrative is darker in its portrait, seeing law as discriminatory and protective of entrenched interests. In this story, law is oppressive and moralistic, the stern guardian of small town values that kept Indiana benighted and backward, an obstacle to progress rather than its aide.
>
> Neither story is correct, but what is striking about both is their inability to speak with discernment or detail about the role of the law in Indiana's history.[11]

Shunning both the rosy, Pollyanna perspective and the negative conclusions about Indiana law's relevance, these legal historians suggest that neither view adequately describes the law's historical significance. However, one might argue that *both* narratives are correct; both narratives may hold true even today.[12] Arguably, Indiana law is both progressive and in some ways discriminatory, moralistic, and oppressive. For example, observers might argue that the 2003 Indiana same-sex adoption case, *In re the Adoption of M.M.G.C.* which permits same-sex, co-parent adoptions, evidences Indiana's innovative capabilities.[13] On the other hand, the Indiana Supreme Court's 2008 decision in *Willis v. State*,[14] permitting a child's whipping with a belt (or extension cord) by his mother, arguably showcases the law's more oppressively punitive features, at least toward children. *Jazzing Up Family Law* addressed both legal novelties and regressions.

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10. *See* Nat'l Park Serv., U.S. Dep't of the Interior, New Orleans Jazz, http://www.nps.gov/jazz/ (last visited July 8, 2009) (highlighting the New Orleans Jazz National Historical Park).

11. Bodenhamer & Shepard, *supra* note 2, at 4.

12. Some Indiana law not only promotes business but also protects entrenched interests. For example, the Indiana Civil Rights Act prohibits employment discrimination. *See* IND. CODE § 22-9-1-2 (2007). *But see* IND. CODE § 22-9-1-16 (2007) (noting that an aggrieved worker cannot sue her employer in an Indiana court under the statute unless the employer agrees in writing to be sued). How convenient for the employer and its business. Needless to say, there is almost no Indiana case law stemming from this law. This statute pays lip service to civil rights while protecting the financial interests of Hoosier business owners. *See* Kathryn Olivier, Note, *The Effect of Indiana Code § 22-9-1-16 on Employee Civil Rights*, 42 IND. L. REV. 441 (2009).

13. *In re* Adoption of M.M.G.C., 785 N.E.2d 267, 270-71 (Ind. Ct. App. 2003).

14. 888 N.E.2d 177 (Ind. 2008).

I. CHILDREN, ABUSED AT HOME

Just weeks before our conference, the Indiana Supreme Court fine-tuned the modern parental privilege and appeared tone deaf to Hoosier children's cries in its *Willis* decision.[15] The *Willis* court reversed a single mother's battery conviction by validating her exercise of the parental privilege to use physical force in disciplining her eleven-year-old son, J.J.[16] Acknowledging that "there is still 'precious little Indiana caselaw providing guidance as to what constitutes proper and reasonable parental discipline of children, and there are no bright-line rules[,]'"[17] the court looked elsewhere for guidance. It noted that "several jurisdictions have embraced some, parts, or all of either the Model Penal Code or the Restatement (Second) of Torts to identify permissible parental conduct in the discipline of children."[18] While the court considered these two legal sources, it failed to mention any social science research regarding the efficacy or hazards of corporal punishment.[19] It cited to no law review articles or scholarly journals concerning corporal punishment of children. Ignoring an official policy statement by the American Academy of Pediatrics,[20] the court validated the lashing of a boy with a belt (or extension cord).[21] In doing so, the court kept

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15. *Id.*

16. *Id.* at 179 (explaining that "Willis instructed J.J. to remove his pants and place his hands on the upper bunk bed. J.J. complied, and Willis proceeded to strike him five to seven times with either a belt or an extension cord. Although trying to swat J.J. on the buttocks, his attempt to avoid the swats resulted in some of them landing on his arm and thigh leaving bruises. J.J. testified that during this exchange his mother was 'mad.'. . . Willis countered that she was not angry but 'disappointed.'") (citation and footnote omitted).

17. *Id.* at 181 (quoting Mitchell v. State, 813 N.E.2d 422, 427 (Ind. Ct. App. 2004)).

18. *Id.*

19. *See, e.g.*, Am. Acad. of Pediatrics, *Consensus Statements*, 98 PEDIATRICS 853, 853 (1996) (providing Consensus Statements from a 1996 Conference entitled: "The Short- and Long-Term Consequences of Corporal Punishment").

20. *See* Comm. on Psychosocial Aspects of Child & Family Health, Am. Acad. of Pediatrics, *Guidance for Effective Discipline*, 101 PEDIATRICS 723, 723 (1998), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics;101/4/723.pdf (stating that "[c]orporal punishment is of limited effectiveness and has potentially deleterious side effects. The American Academy of Pediatrics recommends that parents be encouraged and assisted in the development of methods other than spanking for managing undesired behavior").

21. *Willis*, 888 N.E.2d at 184. *But see id.* (Sullivan, J., dissenting) (noting that "[w]e see on appeal many cases of child abuse in which the parents claim that they were only disciplining their children, that they reasonably believed that the force they used was necessary to control their children or prevent misconduct. By authorizing parents to impose as much force they believe is necessary unless the State proves *beyond a reasonable doubt* that either (1) the force used was unreasonable; or (2) the parents' belief was unreasonable, the Court increases the quantum of effort that the State will be required to expend in its efforts to protect children from abuse. As such, the Court's opinion constitutes a change in our State's policy toward child abuse. Particularly given the commitment of time and resources that the legislative and executive branches have devoted to

consistent with Indiana law dating from the late nineteenth century affirming the parental privilege to beat a thirteen-year-old with a buggy whip.[22]

Noting the *Willis* decision and the law's generic failings with regard to abused and neglected children, our conference's keynote speaker, Judge James W. Payne, described his vision for implementing progressive juvenile law.[23] Director Payne attacked "the mile high wall and mile wide moat" of conservatism that "keeps innovation out" of Indiana.[24] While praising Republican Governor Mitch Daniels's administration, Payne repeatedly struck the innovation chord in his keynote address concerning the needs of U.S. children and the role of the Indiana Department of Child Services (DCS) to help Hoosier children.[25] First, he gave an historical review of the plight of many Midwestern children, explaining that during the last half of the nineteenth century the New York Children's Aid Society moved over 92,000 orphans from New York City to the Midwest following the devastating cholera epidemic.[26] In contrast, Payne emphasized modern Indiana child welfare advocates' focus on the proper return and placement of children.[27] Surveying federal legislation,[28] Director Payne admonished that efforts to "move cases along" are not enough.[29]

Director Payne stressed the importance of Child Family Services Reviews.[30] The Children's Bureau of the U.S. Department of Health and Human Services administers this review system.[31] It ensures conformity with federal child

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this subject for the last two decades and more, I believe that such a policy change should be made by the legislative and executive branches, not the judiciary").

22. Hornbeck v. State, 45 N.E. 620 (Ind. App. 1896) (holding that whether punishment was excessive was a question of fact for the jury).

23. Hon. James W. Payne, Director, Ind. Dep't of Child Servs., Keynote Address at the Indiana Law Review Symposium: Jazzing up Family Law (June 13, 2008) (notes on file with author) [hereinafter Payne, Keynote Address]. Per his preference, the *Indiana Law Review* did not transcribe Judge Payne's address. Thus, all discussion of the keynote address is compiled from this author's notes.

24. *Id.*

25. *Id.*

26. *See id.*; *see also* DUNCAN LINDSEY, THE WELFARE OF CHILDREN 13 (1994).

27. Payne, Keynote Address, *supra* note 23.

28. *See id.* (mentioning Multi-Ethnic Placement Act of 1994, 42 U.S.C. §§ 622, 1320A-2 (2006); Family Preservation and Support Services Program Act of 1993, 42 U.S.C. §§ 629-629i (2006); Strengthening Abuse and Neglect Courts Act of 2000, Pub. L. No. 106-314, 114 Stat. 1266 (codified as amended at 42 U.S.C. § 670 (2006)); Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (codified as amended in scattered sections of 31 U.S.C. & 42 U.S.C.); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.)).

29. *Id.*

30. *Id.* For specific information on Child Family Services Reviews, see generally Child Welfare Information Gateway, Child and Family Services Reviews Resources, http://www.childwelfare.gov/systemwide/service/cfsr/ (last visited July 3, 2009).

31. Payne, Keynote Address, *supra* note 23; *see also* U.S. Dep't of Health & Human Servs.,

welfare requirements, determines what is actually happening to children and families while they are in the child welfare system, and assists states in helping children and families achieve positive outcomes.[32] More specifically, the Bureau tries to ensure that it protects children from abuse and neglect and maintains children in their homes whenever possible, thus fostering permanency and stability.[33] When children cannot remain in their homes, Director Payne explained that DCS tries to secure an early appropriate placement.[34] He highlighted the need for children to have personal items for security and comfort.[35] DCS attempts neighborhood placements and school consistency.[36] DCS also facilitates visitation with siblings and other family members and keeps relevant family members regularly informed of a child's status.[37] DCS watches for evidence of alcohol and drug problems in families to provide early referral to services and treatment programs.[38] By involving all stakeholders and expanding the network of formal and informal support, DCS takes "care of those least capable of taking care of themselves."[39]

Director Payne emphasized the need for tighter time-lines and state responsiveness as he called for data collection and outcome accountability.[40] He noted the importance of time in a child's life: thirty minutes, thirty hours, thirty days. Time, argued Payne, means something very different for a child than it does for an adult.[41] Focusing on the details while not losing sight of the "big picture," Payne suggested that the first thirty minutes of intervention is a critical period for the child.[42] He stressed training for crisis responders and highlighted a child's perspective when discussing this initial phase of intervention.[43] Payne detailed during the second phase—the first thirty hours—risk/safety assessment, placement and/or services, timeliness of service delivery, location of delivery, and follow-up are essential.[44] Decisions concerning these aspects of child protection can significantly influence the rest of the child's life and social

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Children's Bureau, Child Welfare Monitoring, http://www.acf.hhs.gov/programs/cb/cwmonitoring (last visited July 3, 2009).

32. *See* U.S. Dep't Health & Human Servs., Children's Bureau, Child & Family Services Reviews Fact Sheet, http://www.acf.hhs.gov/programs/cb/cwmonitoring/recruit/cfsrfactsheet.htm (last visited July 3, 2009).

33. *Id.*

34. Payne, Keynote Address, *supra* note 23.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

adjustment.[45] In the third phase—the next thirty days—DCS must not just care for the child, but must also manage data collection and reassess the effect of services and intervention.[46] Payne also emphasized the need for rewards for service and intervention success.[47]

When looking to the future of child welfare, Payne again described the need for structural and programmatic innovation. He mentioned family group conferencing, neighborhood meetings, courthouse mediation (when possible in lieu of hearings), expedited family court proceedings, and renewed focus on taxing sources and funding streams to pay for such innovations.[48] Payne advocated one judge for one family and family court over criminal court to promote consistency, efficiency, and better outcomes.[49] He also focused on drug abuse education and eradication and poverty alleviation, citing to the work of Dr. Ruby K. Payne, a pioneer in the effects of poverty on childhood education.[50] Director Payne envisions call centers, more assistance for children stuck in or aging out of foster care, the use of education advocates, and new health care initiatives.[51] One alternative approach mentioned by Payne mandates that children remain in the family home while abusive or troubled parents rotate out.[52] Such a plan puts the children first and safeguards their comfort, security, and stability.[53]

Payne lamented that courts had become trauma centers. An emphasis on therapeutic jurisprudence, he offered, would enhance compliance with judicial orders, facilitate services, and foster better coordination and communication.[54] He noted that while courts may be good at resolving or containing conflict, they are not particularly good at raising children.[55] With vision, respect, leadership and ownership, as well as a commitment by community leaders and key stakeholders, DCS could ensure that Hoosier children fare much better than they have in the past.[56]

In fitting end to his discussion of DCS and its children, Director Payne closed by reciting from memory Mary Dow Brine's poem, *Somebody's Mother*.[57] He finished, "And 'somebody's mother' bowed low her head/In her home that

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* For more information on Dr. Ruby K. Payne, see aha! Process, Inc., About Ruby K. Payne, Ph.D., http://www.ahaprocess.com/About_Us/Ruby_Payne.html (last visited July 3, 2009).

51. Payne, Keynote Address, *supra* note 23.

52. *Id.*

53. *Id.* (mentioning Mary Dow Brine, *Somebody's Mother*, *in* BEST LOVED POEMS OF THE AMERICAN PEOPLE 373, 373-75 (Hazel Felleman & Edward Frank Allen eds., 2008)).

54. *Id.*

55. *Id.*

56. *Id.*

57. Brine, *supra* note 53, at 373-75.

night, and the prayer she said/Was 'God be kind to the noble boy, Who is somebody's son, and pride and joy!'"[58] So, to the beat of this poetic rhyme, our family law conference began on time, against the backdrop of J.J. Willis and his mother's privileged crime.[59]

II. EARLY INDIANA MARRIAGE (AND DIVORCE) LAW

Director Payne's call for family law reform was not the first in Indiana. Unbeknownst to many people, Indiana has a history of producing innovative, as well as scandalously punitive, family law.[60] For example, Indiana marital laws of the 1840s and 1850s permitted any form of ceremony as long as an authorized official witnessed the pair consenting to wed.[61] Even if the marriage was illegitimate, it might still survive if the couple believed it to be valid.[62] Another example of legal innovation occurred in 1850, when the Indiana Constitutional Convention debated whether fundamental rights included the property rights of married women.[63] One man, Robert Dale Owen, encouraged much of this

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58. *Id.*

59. *See* Willis v. State, 888 N.E.2d 1767, 180-84 (Ind. 2008); *see also* IND. CODE § 35-42-2-1 (2008) ("A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor."). Arguably, Ms. Willis's whipping was "a rude, insolent or angry" touching—at least to J.J. *Id.*

60. *But see* David J. Bodenhamer & Hon. Randall T. Shepard, *Preface and Acknowledgments*, *in* THE HISTORY OF INDIANA LAW, at ix, x (David J. Bodenhamer & Hon. Randall T. Shepard eds., 2006) (suggesting that Indiana "has rarely led a legal reform movement, but it has been quick to adopt changes enacted elsewhere"). Indiana family law of the mid-nineteenth-century may be the rare exception.

61. Michael Grossberg notes that an 1843 Indiana Act declared:

> When any marriage is solemnized, the ceremony of marriage may be according to such form or custom as the person solemnizing the same may choose to adopt; but in all cases, no particular form of ceremony shall be necessary, except that the parties shall declare in the presence of the person solemnizing the marriage, that they take each other as husband and wife; and no marriage solemnized before any person professing to be an officer or minister authorized by law to solemnize marriages, shall be adjudged to be void.

MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 76 (1985).

62. *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 43 (2000); GROSSBERG, *supra* note 61, at 76.

63. The Convention considered the following provision:

> Women hereafter married in this State, shall have the right to acquire and possess property to their sole use and disposal; and laws shall be passed securing to them, under equitable conditions, all property, real and personal, whether owned by them before marriage or acquired afterwards by purchase, gift, devise, or in any other way, and also providing for the registration of the wife's separate property.

See HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 111 (2000) (quoting THE REPORT

Indiana debate and focus on the equality of women.[64] Owen, a women's rights advocate and abolitionist, helped his father found the utopian community of New Harmony in southern Indiana.[65] He viewed legally imposed marital unity as potentially oppressive for women.[66] Historian Hendrik Hartog explained:

> To reformers, in fact, marital unity was a cruel joke, a sanctimonious gloss on the reality of male arbitrary authority. "One flesh" might be all very well in theory, but were wife and husband "one in purse?" Of course not. "No sir," declared a reform delegate to the Indiana constitutional convention: if one took "gentlemen in the common run," one would find that they kept "their purses in their pockets," that they distributed money "as their caprice" dictated. Meanwhile, their wives were always "asking and even begging for a solitary dollar" to purchase household necessities.[67]

These views contributed to the notion that oppressed wives should be allowed to rid themselves of drunken, abusive, and neglectful husbands.[68]

During the mid-nineteenth century, Indiana also became commonly known as a "divorce mill" when it passed an omnibus clause to amend its divorce statute.[69] In addition to seven previously recognized grounds for divorce, Indiana added, "any other cause for which the Court shall deem it proper that a divorce should be granted."[70] While not exactly "no-fault" divorce, this clause certainly created no-hassle divorce.

OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 474 (1850) [hereinafter INDIANA CONVENTION]).

64. *See generally* RICHARD WILLIAM LEOPOLD, ROBERT DALE OWEN: A BIOGRAPHY (Octagon Books 1969) (1940); ROBERT DALE OWEN, THREADING MY WAY, TWENTY-SEVEN YEARS OF AUTOBIOGRAPHY (1874); ROBERT DALE OWEN'S TRAVEL JOURNAL, 1827 (Josephine M. Elliott, ed., 1978); ELINOR PANCOAST & ANNE E. LINCOLN., THE INCORRIGIBLE IDEALIST: ROBERT DALE OWEN IN AMERICA (1940).

65. *See* LEOPOLD, *supra* note 64, at 24-46.

66. HARTOG, *supra* note 63, at 112.

67. *Id.* at 113 (citing INDIANA CONVENTION, *supra* note 63, at 498-99).

68. *Id.* at 382 n.53 (suggesting that "Robert Dale Owen insisted on a feminist goal: to free abused women from corrupted men.").

69. *See* COTT, *supra* note 62, at 51; LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW 37-38 (2004); HARTOG, *supra* note 63, at 14, 265; *see also* GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 62 (Univ. Neb. Press 1997) (noting "[i]n a passionate outburst he [Horace Greeley of New York] branded the Hoosier state 'the paradise of free-lovers,' where people could 'get unmarried nearly at pleasure'").

70. COTT, *supra* note 62, at 50; *see also* HARTOG, supra note 63, at 265 ("Two legislative innovations identified Indiana as the pioneer. The first, instituted in 1824, gave Indiana judges the right to grant divorces for any reason they regarded as legitimate if the petitioner failed to demonstrate a ground predefined by legislation. The second, passed in 1852, allowed a judge to grant a divorce to anyone (wife or husband) who had established 'bona fide' residence in his county, without insisting on proof of any prior period of residence.").

That omnibus clause and Indiana's almost non-existent residency requirement attracted many unhappy spouses to evade the divorce laws in their own states to divorce in Indiana.[71] According to an 1858 *Indiana Daily Journal* article, nonresidents filed more than two-thirds of the divorce actions then pending in Marion County.[72] The newspaper noted that the state was "'overrun by a flock of ill-used, and ill-using, petulant, libidinous, extravagant, ill-fitting husbands and wives as a sink is overrun with the foul water of the whole house.'"[73] Between 1867 and 1871, Indiana had the highest divorce rate in the nation.[74] Petitioners could rent a room in a boarding house or hotel to establish residence, hire a lawyer, divorce, and then return to another state.[75] While this divorce industry might have been good for Indiana businesses and services, especially those provided by Indiana lawyers, sister states such as New York, with no such legal escapes, decried the practice.[76] The question arose, raised in terms of American federalism, whether New York judges, for example, were obligated to give full faith and credit to Indiana divorce decrees under the Full Faith and Credit Clause of the U.S. Constitution.[77]

In 1869, the United States Supreme Court confirmed in *Cheever v. Wilson*, "[t]he Constitution and laws of the United States give the [divorce] decree the same effect elsewhere which it had in Indiana. If a judgment is conclusive in a State where it is rendered, it is equally conclusive everywhere in the courts of the United States."[78] In 1857, Annie Jane Cheever had come to Indiana from Washington, D.C. five months prior to her filing for divorce from her then husband B.H. Cheever.[79] At issue in the case was the payment of rents from her separate property owed to Mr. Cheever as child support.[80] Thus, the validity of the divorce decree was pivotal. The Court noted that she could not have obtained this divorce in Washington, D.C.[81] Within months of the divorce, Mrs. Cheever remarried and moved to Kentucky with her new husband, further complicating the situation.[82]

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71. *See* COTT, *supra* note 62, at 51; RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 474 (1988).

72. PHILLIPS, *supra* note 71, at 474 (quoting Val Nolan Jr., *Indiana: Birthplace of Migratory Divorce*, 26 IND. L.J. 515, 522 (1951)).

73. *Id.*

74. *Id.* at 475.

75. HARTOG, *supra* note 63, at 265.

76. *See* COTT, *supra* note 62, at 51.

77. U.S. CONST. art. IV, § 1.

78. Cheever v. Wilson, 76 U.S. 108, 123 (1869) (internal quotes and footnotes omitted); *see also* Christmas v. Russell, 72 U.S. 290, 302 (1866).

79. *Cheever*, 76 U.S. at 109-10.

80. *Id.* at 112.

81. *Id.* at 110.

82. *Id.* (explaining that "[t]here was little in the record to show exactly what motive took Mrs. Cheever from Washington to Indiana; or how long *exactly* she remained in Indiana, or how or where, by dates, she was living after she left it. But it was certain that divorces *a vinculo* could not,

Since *Cheever*, the Supreme Court has numerous times confirmed the validity of one state's legally obtained divorce decrees in sister states.[83] However, partly in response to public outcry concerning the divorce market here, "[b]etween 1859 and 1873 Indiana increased its residency requirement and eliminated the omnibus clause."[84] Between 1877 and 1881, Indiana reverted to seventh place in the nation for its divorce rate.[85] Robert Dale Owen had retired from political service by 1859 and died in June 1877.[86] Thus, one of the major forces behind liberal divorce and rights for women was inactive during this proverbial backward pendulum swing. Not until the 1970s did Indiana again significantly liberalize its divorce statutes, when it became the third state to adopt "no fault" divorce.[87]

In her article, *Jazz and Family Law: Structures, Freedoms, and Sound Changes*, Professor Sheila Simon compares the evolution of jazz and the evolution of family law.[88] She highlights the tension between restriction and freedom, between group performance and individuality, in both jazz and family law.[89] Indiana's experiment with liberal divorce reinforces her points. She writes, "[w]e [can] learn from the history of jazz that expansion of freedoms will be treated with disdain, at least initially."[90] And so was liberal divorce treated with disdain—for another hundred years until the adoption of exclusive "no fault" divorce in California in 1969 during the tenure of Governor Ronald Reagan.[91]

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when she went to Indiana, nor until long after she was divorced in that State, be obtained by law in the District of Columbia"). And, we think we live in a more mobile society today!

83. *See, e.g.*, Haddock v. Haddock, 201 U.S. 562 (1901) (holding that when one court does not have jurisdiction over the subject matter or the defendant, courts of other states are not obligated under the Full Faith and Credit Clause to enforce the judgment of the first state), *overruled by* Williams v. North Carolina, 317 U.S. 287 (1942); Cheely v. Clayton, 110 U.S. 701 (1884) (rejecting the validity of a decree of divorce obtained in Colorado by a husband domiciled there against his wife in Illinois for failure to satisfy the Colorado notice requirement but confirming the effect of validly obtained decrees).

84. COTT, *supra* note 62, at 44 n.61; *see also* RILEY, *supra* note 69, at 65-66 (citing LAWS OF THE STATE OF INDIANA, 1859, at 108-10 (1859)); LAWS OF THE STATE OF INDIANA PASSED AT THE FORTY-EIGHTH REGULAR SESSION OF THE GENERAL ASSEMBLY, 1873, at 107-12 (1873) (explaining that the residency requirement increased to one year in 1859 and two years in 1873).

85. PHILLIPS, *supra* note 71, at 475 (citing Nolan, *supra* note 72, at 517-20).

86. *See* Biographical Directory of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=O000152 (last visited Mar. 10, 2009).

87. *See* Michael Grossberg & Amy Elson, *Family Law in Indiana: A Domestic Relations Crossroads*, *in* THE HISTORY OF INDIANA LAW 60, 77 (David J. Bodenhamer & Hon. Randall T. Shepard eds., 2006).

88. *See* Sheila Simon, *Jazz and Family Law: Structures, Freedoms and Sound Changes*, 42 IND. L. REV. 567, 567 (2009).

89. *See id.* at 572.

90. *See id.* at 580.

91. Herma Hill Kay, *"Making Marriage and Divorce Safe for Women" Revisited*, 32

III. MODERN FAMILY LAW

In recent years, far from being an instrument of innovation, Indiana has resisted marriage (and consequently divorce) law improvisation by other state courts. For example, in 1996 a circuit court of Hawaii found that the state law providing for only opposite-sex marriage violated Hawaii's equal protection clause.[92] In a cacophony of legislative motion following this 1996 *Baehr v. Miike* decision, many states amended their state constitutions to prohibit same-sex marriage and sometimes even the recognition of same-sex marriages performed elsewhere.[93] Many scholars have addressed the issue of whether the 1996 Federal Defense of Marriage Act (DOMA)[94] and the state constitution equivalents violate the Full Faith and Credit Clause.[95] Several academics have also explored the issue of comity between states to evaluate whether such limitations on the right to marry are enforceable.[96]

Under the doctrine of comity, validly married same-sex couples that come to Indiana (whether from Massachusetts,[97] California,[98] Connecticut,[99] Iowa,[100]

HOFSTRA L. REV. 71, 74 (2003).

92. *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

93. Although this Author recognizes the ease with which Wikipedia may be altered, since the issue of which states recognize same sex marriage is rapidly changing, Wikipedia is the best source to monitor this change. Thus, for a U.S. map of state stances on same-sex marriage, see Wikipedia.org, Same Sex Marriage in USA, http://en.wikipedia.org/wiki/Image:Samesex_marriage_in_USA.svg (last visited July 3, 2009).

94. Defense of Marriage Act, U.S.C. § 7 (2006), 28 U.S.C. § 1738C (2006).

95. *See, e.g.*, Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 18-19 (1997) (noting the disagreement about the scope of Congress' power under the Full Faith and Credit Clause); Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 301 (1997) (arguing, among other things, that "the explicit provision of power to Congress in the Full Faith and Credit Clause does not entitle Congress to 'restrict, abrogate, or dilute' the effects of the Full Faith and Credit Clause"); Heather Hamilton, Comment, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 947 (1998) (arguing that "Congress violated the mandates of the Full Faith and Credit Clause when it enacted section 2 of DOMA").

96. *See, e.g.*, Joanna Grossman, *Resurrecting Comity: Revisiting The Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433 (2005).

97. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

98. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), *superseded by const. amend.*, CAL. CONST. art. 1, § 7.5.

99. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

100. *See* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

Vermont,[101] Maine,[102] New Hampshire[103] or some other state that might ultimately sanction same-sex marriage) arguably should enjoy the same rights that Hoosiers married in Indiana enjoy.[104] Comity is a doctrine of courtesy, however, not of rights. In 2002, an Indiana court confirmed that "Indiana courts need not apply a sister state's law if such law violates Indiana public policy."[105] Indiana Code section 31-11-1-1(b) passed as amended in 1997 evidences such a policy: "A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized."[106] This statute is Indiana's mezzo-forte public policy response to same-sex marriage—a complete exclusion of untraditional marriage. So much for comity in Indiana.

Indiana's public policy may also provide the means to avoid the Full Faith and Credit Clause. The Clause provides, "Full Faith and Credit shall be given in each State to the public *Acts, Records, and judicial Proceedings* of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[107] Family law scholars have thoroughly debated whether this clause, which clearly protects state divorce decrees, also protects state-sanctioned marriages and particularly same-sex marriages.[108] As part of that debate, they explored whether a state's public policy justifies the refusal to grant full faith and credit. Some

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101. *See* S. 115, § 8, 2009-2010 Leg., Reg. Sess. (Vt. 2009) (to be codified at VT. STAT. ANN. tit. 15, § 8 (effective Sept. 1, 2009).

102. *See* L.D. 1020, 124th Leg., 1st Reg. Sess. (Me. 2009) (to be codified at ME. REV. STAT. ANN. tit. 19-A, § 650-A) (effective September 2009).

103. *See* H.B. 436-FN-LOCAL, 2009 Leg., 1st Reg. Sess. (N.H. 2009) (to be codified at N.H. REV. STAT. ANN. § 457:1) (effective Jan. 1, 2010).

104. *See generally* Mason v. Mason, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002) (recognizing the existence of a foreign marriage as a matter of comity). An official opinion from former Attorney General Stephen Carter suggests otherwise, however. Carter wrote, "With the notable exception of same-sex marriages, Indiana generally accepts the validity of a marriage that complied with the legal requirements of the jurisdiction in which it was performed." Stephen Carter, Solemnization of Marriages Under Indiana Law, 2004 Ind. Op. Att'y Gen. No. 03 (Mar. 26, 2004).

105. *Mason*, 775 N.E.2d at 709 (citing Maroon v. State Dep't of Mental Health, 411 N.E.2d 404, 410 (Ind. Ct. App. 1980)).

106. IND. CODE § 31-11-1-1(b) (2008).

107. U.S. CONST. art. IV, § 1 (emphasis added).

108. *Compare* Mark Strasser, Baker *and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307 (1998) (arguing that the Full Faith and Credit Clause requires recognition of marriages valid where celebrated if the parties are domiciled in that jurisdiction at the time of celebration), *and* Mark Strasser, *For Whom the Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339 (1998) (suggesting that states must recognize same sex marriages of couples domiciled at place of celebration but not those marriages of couples who evade their home state's restrictive marriage laws by marrying in another state), *with* David P. Currie, *Full Faith & Credit to Marriages*, 1 GREEN BAG 2D 7, 8 (1997) (rejecting the notion that Full Faith and Credit would require states to recognize same-sex marriage).

argue that marriages, valid where celebrated, are protected by the clause in sister states.[109] Others scholars insist that one state may not forcibly export its unusual marriage laws to sister states.[110] Professor Joseph Singer makes an important contribution to this debate:

> In my view, there are two strong arguments for requiring recognition of same sex marriages under the Full Faith and Credit Clause. The first argument is that the Full Faith and Credit Clause must be construed in light of other constitutional norms, including those underlying the Commerce Clause, the constitutional right to travel, the Takings Clause, the First Amendment, and the fundamental right to marry. Even if none of these clauses or constitutional rights is sufficient in itself to impose a rigid place of celebration rule, the combination is arguably powerful. Second, the marriage case is analogous to other cases in which the Supreme Court has identified a single state whose law is entitled to recognition by other states even if this allows that one state to export its law to the whole country. Those cases include the mandated recognition of Nevada divorces in *Williams I* and the mandated recognition of Delaware corporate law in *CTS Corp.* and in *Edgar v. MITE*.[111]

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109. *See* Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's* Baehr v. Lewin, 32 U. LOUISVILLE J. FAM. L. 551, 581-82 (1994) (arguing that states should recognize legal incidents of marriages that are valid where celebrated); Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221 (1996).

110. *See, e.g.*, Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409 (1998); *see also* Linda Silberman & Karin Wolfe, *The Importance of Private International Law for Family Issues in an Era of Globalization: Two Case Studies—International Child Abduction and Same-Sex Unions*, 32 HOFSTRA L. REV. 233, 247-49 (2003); Joseph Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 32 (2005).

111. Singer, *supra* note 110, at 35 (citing Williams v. State, 317 U.S. 287 (1942); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1989); Edgar v. NITZ Corp., 437 U.S. 624 (1982); John Sauer, *The Full Faith and Credit Clause, Reverse Incorporation and Interstate Recognition of Same-Sex Marriages* (2004)). Professor Joseph Singer also discusses "the justifications for the place of celebration rule or a substitute choice of law rule that chooses the law that would validate the marriage." *Id.* at 31 (citing WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 119[c] (3d rev. ed. 2003)); *see also* Henson, *supra* note 109, at 576 (noting that "'[b]ecause marriage is a long continuing relationship, there normally is a need that its existence be subject to regulation by one law without occasion for repeated redetermination of the validity. Human mobility ought not to jeopardize the reasonable expectations of those relying on an assumed family pattern. Consequently, the courts will usually look to a law deemed to be appropriately applicable to the parties at the time the relationship is begun.'" (quoting EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS §§ 813.1-.2 (2d ed. 1992)).

Singer further elaborates on this debate by suggesting:

How ironic that Indiana, which experimented with marriage and divorce law in the 1850s and 60s and saw its decrees contested in sister states, now refuses either to practice comity or to give full faith and credit to sister state marriages more than 150 years later. Time will tell whether the U.S. Supreme Court puts its weight behind the federation and the Constitution's Full Faith and Credit Clause or behind niggardly state rights, such as those now offered in Indiana.[112] No one anticipates a judicial preference from the Court for gay marriage any time

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> Thus the question may [be, in part] . . . whether those who undertake the obligations of marriage in Massachusetts may, unlike other married couples, escape those obligations simply by relocating to another state. . . .
>
> Such states are, in effect, establishing themselves as havens for the unscrupulous, as refuges for fugitives from justice. In the guise of determining their own family law, they may be enabling spouses and parents to evade their obligations.

Singer, *supra* note 110, at 6. One might argue that gays and lesbians are no more unscrupulous than other persons in the general population. Same-sex couples marry not to avoid their obligations but to commit officially to ones informally made. Arguably, few homosexuals will travel to Connecticut to marry just so they that can then avoid their obligations later. Furthermore, Singer's reasoning here would have justified state refusal to recognize sister state divorce decrees on the ground that such divorces enable unscrupulous spouses and parents to evade their obligations.

112. During the 2008 *Jazzing Up Family Law* Conference, Professor Adele Morrison, Ms. Cathy Sakimura, Esq. and Ms. Judith Sperling-Newton, Esq. each dealt with the legal problems of same-sex couples who cannot marry by addressing adoption and surrogacy laws that discriminate against lesbian, gay, bisexual, and transgender (LGBT) nonmarital families. Professor Susan Waysdorf moderated this panel, entitled "Over The Rainbow: LGBT Families." *See* Conference Agenda, *supra* note 5. Professor Adele Morrison presented *Straightening Out the Kids: LGBT Identity and the State's Construction of Optimal Families by Abandoning the Best Interests Standard*; Cathy Sakimura presented *Protecting LGBT Parent Families*; and Judith Sperling-Newton presented *Family Building Through Surrogacy for Same-Sex Couples*. For notes from this session, see Jennifer Drobac, Notes from "Over the Rainbow: LGBT Families" (June 13, 2008) (on file with author) [hereinafter "Over the Rainbow" Notes].

Not all states that prohibit same-sex marriage discriminate in their adoption laws. In 2003, the Indiana Court of Appeals found, for a prospective adoptive mother and same-sex partner, a common law variation of step-parent adoption that leaves intact the parental rights of the first adoptive mother. The court reasoned:

> Consonant with our General Assembly's policy of providing stable homes for children through adoption, we conclude that Indiana's common law permits a second parent to adopt a child without divesting the rights of the first adoptive parent. Allowing a second parent to share legal responsibility for the financial, spiritual, educational, and emotional well-being of the child in a stable, supportive, and nurturing environment can only be in the best interest of that child.

In re Adoption of M.M.G.C., 785 N.E.2d 267, 270-71 (Ind. Ct. App. 2003). This ringing endorsement of the best interests of the child standard and creative use of common law to provide two adoptive parents to three children confirms that Indiana courts still have the ability to improvise—at least for adopted Hoosier children.

soon.

Both legislative and judicial biases figure prominently in the formulation of marriage law—as we saw emphasized by several panelists during the conference. Following Director Payne's overture, which included his mention of poverty and child welfare outcomes, other speakers, and particularly Professor David Papke, focused more directly on biases relating to poverty.[113] In his article, *Family Law for the Underclass: Underscoring Law's Ideological Function*,[114] Papke examines the law's treatment of the underclass, that population of un- or underemployed Americans who "lead lives of semi-permanent poverty and debilitating transience."[115] He illustrates the notion that "the underclass does not comport itself with the norms of the middle and upper classes and, therefore, lives its collective life improperly."[116] Describing the underclass's vilification even in the media, Papke quotes Myron Magnet who characterized the underclass "through 'not so much their poverty or race as their behavior—the chronic lawlessness, drug use, . . . welfare dependency, and school failure.'"[117]

Papke asserts that family law, particularly marriage, child support, and adoption law, condemns the underclass.[118] For example, Papke explains in his article that members of the underclass do not marry with the same frequency as those of the upper and middle classes.[119] A decoupling of sex and marriage, along with rising economic standards (at least up until 2008!) and a desire for financial stability, has disproportionately prompted many poor people to postpone or forego marriage.[120] Decrying this "'lifestyle choice [not to

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113. This panel, entitled "Greenback Dollar: Family Law, Support, & Poverty" and moderated by Prof. Evelyn Tenenbaum, also included: Prof. Karen Czapanskiy, presenting *Child Support and Families with a Child with a Disabling Condition*, Prof. Maria Pabón López, presenting *A Tale of Two Systems: Analyzing the Treatment of Noncitizen Families in State Family Law Systems and Under the Immigration Law System*, and Prof. Courtney Joslin, presenting *Assisted Reproductive Technology and Parentage: How Exclusionary Parentage Rules Leave Children Financially Vulnerable*. *See* Conference Agenda, *supra* note 5; *see also* Jennifer Drobac, Notes from "Greenback Dollar: Family Law, Support, and Poverty" (June 13, 2008) (on file with author).

114. *See* David Ray Papke, *Family Law for the Underclass: Underscoring Law's Ideological Function*, 42 IND. L. REV. 583 (2009).

115. *See id.* at 584.

116. *See id.*

117. *See id.* at 586 (quoting Myron Magnet, *America's Underclass: What to Do?*, FORTUNE, May 11, 1987, at 130).

118. *See generally id.* at 589-608.

119. *See id.* at 589 (citing Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 THE FUTURE OF CHILDREN, Fall 2005, at 117-18).

120. *See id.* at 590 (citing GARY S. BECKER, A TREATISE ON THE FAMILY 14-37 (1981); KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 201 (2005); Christina M. Gibson-Davis et al., *High Hopes but Even Higher Expectations: The Retreat from Marriage Among Low-Income Couples*, 67 J. MARRIAGE & FAM. 1307 (2005)).

marry],'"[121] marriage proponents emphasize marriage as the foundational building block of society which promotes the interests of children.[122] Part of "The Deficit Reduction Act of 2005," "The Healthy Marriage Initiative" creates marriage promotion programs,[123] some specifically targeting members of the underclass.[124] Papke concludes that such marriage promotion laws encourage marriage as "the moral and intelligent choice."[125] "If they [the underclass] do not make such a choice, they are living in an inappropriate way and in effect responsible for their own poverty. Upstanding Americans need not approve, and surely the state should not have to provide financial support."[126] Papke effectively reveals the flaws with this policy and its results.

This condemning reasoning regarding members of the underclass who choose not to marry prompts further analysis concerning another so-called "lifestyle choice," same-sex relationships. If marriage is the optimal family union that fosters children, the question arises why states—especially those that purport to value children and families—would not promote "healthy marriages" for same-sex couples. Is it possible that the wealthier, more politically powerful, moral majority condemns not only the underclass but also the homosexual class? To wit, laws that foreclose same-sex marriage leave homosexuals with the option of only heterosexual marriage. If homosexuals do not make such a choice, they are living in an inappropriate way and are in effect responsible for their own moral and financial poverty. Upstanding Americans need not approve, and surely the state should not have to provide financial support in the form of numerous federal and state marital benefits. Arguably, Professor Papke's analysis for the underclass in the context of marriage has relevance more broadly.

A. Child Support

In his exploration of family law's censure of the underclass, Papke also reviews the deadbeat-dad laws designed to establish paternity, locate fugitive child support payers, and enforce child support orders.[127] He notes in particular the Child Support Recovery Act (CSRA) and the Deadbeat Parents Punishment Act (DPPA) which amended the CSRA in 1998.[128] The DPPA operates under the *presumption* that the target debtor is capable of paying child support.[129] Papke

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121. *Id.* at 592 (citing Dan Quayle, U.S. Vice President, Address to the Commonwealth Club of California (May 19, 1992) (transcript available at https://www.commonwealthclub.org/archive/20thcentury/92-05quayle-speech.html).

122. *See id.* at 592-93.

123. *See id.* at 593 (citing Deficit Reduction Act of 2005, Pub. L. No. 109-171, 104 Stat. 4 (codified as amended at 42 U.S.C. § 603(a)(2)(1) (2006)).

124. *See id.* at 594.

125. *Id.* at 596.

126. *Id.*

127. *See id.* at 597-98.

128. *See id.* at 600 (referring to 18 U.S.C. § 228 (2006)).

129. *See* 18 U.S.C. § 228(b) (2006).

explains that, not surprisingly, collection efforts have been most effective against middle and upper class payers, not against the underclass.[130] He concludes that the failure to deal with the inability to pay, namely poverty, confounds wealthier American lawmakers.[131] Papke suggests that according to "comfortable Americans who promoted the new laws and processes, the poor not only fail to respect the institution of marriage but also fail to satisfactorily support their children . . . . Members of the underclass can be deplored and vilified even if we do not effectively police them."[132] One wonders whether the majority of these fathers are deadbeats or more like proverbial bloodless turnips, used by the more affluent to confirm their own righteousness and worth.

Professor Leslie Harris also addresses poor and nonmarital families in her article, *The Basis for Legal Parentage and the Clash between Custody and Child Support*.[133] In particular, she suggests that "a public system of family law, that applies principally to poor people, especially recipients of public benefits, focuses on conservation of public funds."[134] Dealing with the issues of custody and child support, Harris evaluates the traditional importance of functional parent-child relationships for custody and biology (DNA) for financial support.[135] She argues that, in some cases, biology trumps functional parenthood in the award of support or disestablishment of support obligations.[136] Such rulings may contravene the best interests of the child whom courts then leave without an alternate supporting parent.[137] Such rulings can also produce psychological trauma in children when they lose the only father (typically) whom they have ever known.[138]

Harris is less concerned with the efficacy of child support collection and the legal treatment of primarily poor fathers than is Papke.[139] Instead, she concentrates on how the law distinguishes biological and functional parenthood in a manner sometimes unrelated to child welfare.[140] Echoing Papke and Payne's reminders that the birth rate of nonmarital children has trebled,[141] Harris emphasizes the growing dominance of public law, "which privilege[s] biology."[142] She suggests that biology based parentage "threatens to displace

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130. *See* Papke, *supra* note 114, at 600.

131. *See id.*

132. *See id.* at 601.

133. *See generally* Leslie Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611 (2009).

134. *Id.* at 612-13 (citing Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status (Part 1)*, 16 STAN. L. REV. 257, 257-58 (1964)).

135. *Id.*

136. *Id.* at 632.

137. *Id.* at 633.

138. *Id.*

139. *Compare* Papke, *supra* note 114, *with* Harris, *supra* note 133.

140. Harris, *supra* note 133, at 632.

141. *See id.* at 631-32.

142. *See id.* at 614.

rules based on functional parent-child relationships . . . ."[143] Here, we see the proverbial reign of form over substance.

Attacking the disestablishment of paternity for those claiming "paternity fraud," Harris suggests that the law disadvantages nonmarital children whose parentage is not so irrevocably set as the law establishes it for marital children.[144] Marital children typically enjoy a presumption that the mother's husband is the father.[145] Harris advocates for the protection of functional parent-child relationships that work in the best interests of children in the contexts of both custody and support disputes.[146] She also urges the de-emphasis of biology in child support, especially if the father is a raped minor (per statutory law) or if DNA testing might create more trauma for the child than it resolves for the adults.[147] In sum, she suggests that the piper should call the tune.

B. Adoption and Its Annulment

Continuing the focus on children at the conference, several family law theorists explored adoption.[148] In her article, *Permanence and Parenthood: The Case for Abolishing the Adoption Annulment Doctrine*, Professor Margaret Mahoney examines the plight of adopted children whose parents desire to return them or otherwise sever the parent-child relationship and avoid support obligations.[149] Advocating evenhanded treatment of adopted children and public policies, like the one stressed by Director Payne favoring permanency, Mahoney calls for the abrogation of the adoption annulment doctrine.[150]

Using an Indiana case, *In re Adoption of T.B.*,[151] Mahoney argues how the adoption annulment doctrine discriminates against adopted children and often does not operate to further their best interests.[152] Contrasting standards applied to biological parents seeking to terminate their rights, Mahoney notes that the best interests of those biological children usually prevail.[153] When discussing adoption, Mahoney explores fraud claims, the extension of limitations rules, and

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143. *See id.*

144. *See id.* at 627-28.

145. *See id.* at 622-23.

146. *See id.* at 633-34.

147. *See id.* at 627, 633 (citing Mary R. Anderlik, *Assessing the Quality of DNA-based Parentage Testing: Findings from a Survey of Laboratories*, 43 JURIMETRICS J. 291, 305-06 (2003)).

148. While many scholars including Professor Papke touched on adoption, the "Over the Rainbow" panel visited it more in the context of same-sex relationships. *See* "Over the Rainbow" Notes, *supra* note 112.

149. Margaret M. Mahoney, *Permanence and Parenthood: The Case for Abolishing the Adoption Annulment Doctrine*, 42 IND. L. REV. 639 (2009).

150. *See id.* at 642.

151. *In re* Adoption of T.B., 622 N.E.2d 921 (Ind. 1993); Mahoney, *supra* note 149.

152. Mahoney, *supra* note 149, at 646.

153. *Id.* at 648.

the power of courts to cure their own adoption mistakes.[154] She argues that in *T.B.*, "the parent-child relationship was judicially terminated, without any consideration of the child's interests, because the parents were able to prove fraud in the initial adoption proceeding."[155] She concludes that the adoption annulment doctrine serves "the interests of adult parties and the integrity of the judicial system"[156] but not necessarily children.

While Mahoney's overarching assertions are convincing, her use of Indiana's *T.B.* case is problematic because of its ultimate resolution.[157] *In re Adoption of T.B.* involved a mother's request for state assistance with her adoptive daughter.[158] In response to a request by T.B.'s mother for intervention, the Indiana Juvenile Court found T.B. a child in need of services (CHINS) and assigned her to a residential care facility.[159] Five years after the adoption when T.B. was 16, the mother filed a petition to revoke her daughter's adoption.[160] It is difficult to tell from the recitation of the facts whether T.B. was a typical teenager, rebelling against her mother, or an unusually violent runaway.[161] The facts acknowledge, however, that "T.B. made death threats against Sudis [her adoptive mother]."[162]

The Indiana Supreme Court ultimately overturned the case in which the trial court had granted the adoption annulment,[163] but not before noting that it had the power to set the adoption aside.[164] Mahoney emphasizes the court holding, "Although public policy abhors the idea of being able to 'send the child back,' we recognize that an order of adoption is a judgment and may be set aside pursuant to Indiana Trial Rule 60(B)."[165] The problem, as the court saw it, was that the *T.B.* facts failed to support the mother's fraud allegation.[166] The court noted, "T.B. admitted to her guardian ad litem that she did not inform anyone of the [sexual] abuse [which occurred before her adoption] until her treatment at Charter Hospital [four years after the adoption]."[167] Thus, the supreme court specifically rejected the fraud allegation.[168]

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154. *Id.* at 655.

155. *Id.* at 665 (citing *In re Adoption of T.B.*, 622 N.E.2d at 925).

156. *Id.* at 660.

157. Mahoney may use *In re Adoption of T.B.* not because it ultimately furthers her point, but because she writes for an Indiana audience and the lower court decisions support her reasoning.

158. *In re Adoption of T.B.*, 622 N.E.2d at 922-23.

159. *Id.* at 922.

160. *Id.* at 923.

161. *See id.* at 922.

162. *Id.*

163. *Id.* at 925.

164. *Id.* at 924.

165. *Id.*

166. *Id.* at 924-25.

167. *Id.* at 922.

168. *Id.* at 925 ("Although the record may support a finding that [the Department of Family Services (FCS)] acted negligently in failing to discover the alleged sexual abuse, it does not support

Even though Indiana law allowed for an adoption to be set aside, the court rejected the petition because the mother "was not the proper party to bring the action," and the trial court had mistakenly ruled on the case.[169] Overruling the trial court, the supreme court reasoned:

> Sudis' petition also asserted that it was in the best interests of T.B. to terminate the relationship. . . . Because Sudis was not the proper party to bring the action, the merits of the action were not properly before the trial court. If at some future date the guardian ad litem or other party provided by statute chooses to bring the action, the merits could then be properly adjudicated by the trial court.[170]

This passage indicates that the court would have engaged in a best interests analysis had the guardian ad litem or special advocate for the child brought the action.[171] The Indiana Supreme Court seemingly anticipated Mahoney's primary point emphasizing the child's best interests and made an arguably progressive ruling to deny the adoption annulment.[172]

Mahoney's proposal for reform makes sense despite the final outcome of *In re Adoption of T.B.* Specifically, she suggests that the appropriate remedy in the fraud cases is damages.[173] She logically argues, "Rescission of the adoption order, on the other hand, dramatically impacts the adopted child, who was not a party to the fraud alleged by the adoptive parent."[174] Mahoney further asserts that the vindication of the judicial system offered by an adoption annulment does not justify the disruption of the parent-child relationship.[175]

Professor Papke also addresses adoption law in his discussion of the underclass.[176] Unlike Mahoney, Papke places less confidence in the best interests standard.[177] He argues that adoption laws and procedures favor the adoption of underclass children by wealthier parents and "encourages underclass biological parents to think of themselves as failures."[178] The "best interests of the child" standard when combined with idealized notions of the nuclear family promotes child adoption out of poor single parent or nonmarital families into more "bourgeois nuclear families."[179] Papke explains that an emphasis on "exclusive mothering" undervalues shared parenting patterns developed in underclass

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a finding that FCS committed fraud. Consequently, the attempt to set aside the adoption based upon fraud must fail.").

169. *Id.*

170. *Id.* (citing IND. CODE §§ 31-6-5-2 & -4 (2008)).

171. *See id.*

172. *See id.*

173. Mahoney, *supra* note 149, at 673.

174. *Id.*

175. *Id.*

176. *See* Papke, *supra* note 114, at 602.

177. *See id.* at 605.

178. *Id.* at 602.

179. *Id.* at 606.

networks.[180]

Papke uses law and even popular culture, the film *Losing Isaiah*,[181] to support his point:

> According to the dominant ideology, underclass children are poised on the junk heap of life. Their homes are unstable and perhaps unhealthy, and their biological parents do a lousy job of parenting. The children will have their best chance to thrive if they move from their scrambled, underclass families to stable, bourgeois families typical of the American mainstream.[182]

The problem with Papke's use of *Losing Isaiah* to illustrate this point is that the law (via the court) ultimately returned Isaiah to his formerly drug addicted, biological, African American, underclass mother, Khaila Richards.[183] While the film may have condemned Richards and favored the middle class adoptive mother, the law (at least in this script) worked to reunite the underclass family.[184] Papke's point is well taken, however, that the audience is meant to empathize not with Richards, but with the middle class, adoptive parents and the child.[185] In this fictional case, biological parenthood thwarted the "best interests of the child" and trumped all else, including class biases. In that regard, *Losing Isaiah* reinforces Professor Harris's point about biology's dominance (Richards) over functional parenthood (the preferred fictional adoptive mother).[186]

One sees the relevance of these thematic strands in Indiana's *Willis* case, mentioned at the beginning of this Article.[187] The court began its opinion, "Sophia Willis is a single mother raising her eleven-year-old son, J.J., who has a history of untruthfulness and taking property belonging to others."[188] The court detailed how "[e]xperiencing ongoing disciplinary problems with J.J., Willis sent him to her sister's home over the next two days to ponder her options."[189] While Papke notes the law's modern, middle class preference for exclusive parenting,[190] here, the court favors the use of the extended network so that Willis could rationally weigh her options.[191] Her considered decision was to beat the child into submission and good behavior.[192] The court, overturning the battery conviction that had been affirmed at the appellate level, noted twice more that

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180. *Id.*
181. *Id.* at 607-08 (citing LOSING ISAIAH (Paramount Pictures 1995)).
182. *Id.* at 608.
183. *See id.* (citing LOSING ISAIAH, *supra* note 181).
184. LOSING ISAIAH, *supra* note 181.
185. Papke, *supra* note 114, at 608.
186. *Id.*
187. Willis v. State, 888 N.E.2d 177 (Ind. 2008).
188. *Id.* at 179.
189. *Id.*
190. Papke, *supra* note 114, at 606.
191. *See Willis*, 888 N.E.2d at 179.
192. *Id.*

Willis was a single parent and joined the court of appeals, "[s]ympathizing with Willis' argument that she is a single parent doing the best she can."[193]

Facts that do not appear in the court decisions bring nuance to the Willis case. According to her white, appellate court attorney, Robert D. King, Jr., Sophia Willis is a "petite, African-American woman" who "weighs about the same as an eleven-year-old boy."[194] The suggestion that she should (or could) have given J.J. "a time-out for behavior that could have been charged as a felony [stealing his mother's clothes] is a joke."[195] Statements she made to DCS while unrepresented by counsel were later used by the prosecution to convict her.[196] King speculates that had Willis's trial attorney requested a jury instead of a bench trial, no Hoosier jury would have convicted her given the facts of the case and the criminal path her son was taking.[197]

These additional facts raise serious questions. Did DCS find J.J. a Child in Need of Services (CHINS) and offer (or mandate) services?[198] Surely, counseling for the boy and parenting classes for Ms. Willis would have been preferable to Willis's criminal conviction for child abuse. If services were not offered, why not—and why was this case diverted to the criminal justice system? J.J. was ultimately sent to live with his father in Georgia.[199] Did Indiana authorities ship out an African-American male youth whom they suspected was headed for the criminal justice system himself? King further speculates that if Sophia Willis had been a white, single mother with a white, middle class child from Boone County (where he lives) instead of an African-American mother from Marion County, this case would have turned out very differently at the early stages.[200] Did the Indiana Supreme Court cure a defect in the law[201] or did it address race and class bias at an administrative level, such as at the prosecutor's

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193. *Id.* at 180.

194. Telephone Interview with Robert D. King, Jr., Attorney, Law Firm of Robert D. King, Jr., P.C., in Indianapolis, Ind. (Dec. 23, 2008) [hereinafter King Telephone Interview].

195. *Id.*

196. *Id.*

197. *Id.*

198. Statements made at the supreme court oral argument indicate that a CHINS inquiry might have been initiated but the record did not reflect the results of that process. *See* Oral Argument, *Willis*, 888 N.E.2d 177 (Sep. 6, 2007), *available at* http://www.indianacourts.org/apps/webcasts/default.aspx?view=table&yr=2007&sort=&page=5 [hereinafter Willis Oral Argument].

199. *Id.*; King Telephone Interview, *supra* note 194.

200. *See* Willis Oral Argument, *supra* note 198, at 4:50 to 5:11 minutes (during oral argument, Justice Dickson suggested with his questions that the trial judge showed leniency and sympathy toward Ms. Willis by reducing the charge from a felony to a misdemeanor and by suspending the sentence).

201. Smith v. State, 489 N.E.2d 140, 142 (Ind. Ct. App. 1986) (affirming the battery conviction of a father who beat his daughter approximately fifteen times with a belt after her report card showed three failing grades. The fifteen year old suffered facial lacerations as well as contusions and the court called the punishment excessive). It is not clear that *Willis* would cause a court to decide *Smith* differently.

office, with a decision that will prove unwieldy and unwise legal precedent?

We cannot know from this anecdotal account how the family law system actually played out in all its particulars. Without more information, we cannot make any conclusions about the functioning of DCS or the prosecutor's office. The question remains whether an African-American father who administered such a beating would have been successful advancing the defense of privilege. That is, did Ms. Willis's sex play a role in the law's treatment of her case? Did her marital status make a difference? If so, should it have? Finally—taking an intersectional approach,[202] we do not know if state officials treated Sophia Willis like Khalia Richards,[203] a single, female, African-American member of the underclass. However, the Willis family story and its legal outcome raise concerns. Unlike the fictional Khalia Richards, the real Sophia Willis lost custody of her son.[204] Moreover, this case highlights that, despite advances in modern biology including child development and social science, little has changed in the Indiana parenting privilege in the last 100-plus years.[205]

C. Abuse Outside of the Family Home

Themes from our panelists' presentations regarding the abuse of family members resonated not just with respect to child abuse by their parents but also to abuse of family members by others, outside of the family.[206] Questions arose regarding how family members and society at large should first identify and then address such abuse.[207] In her paper, *Drawing a Line on the Blackboard: Why High School Students Cannot Welcome Sexual Relationships with Their*

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202. *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (exploring the notion of intersectionality with respect to women of color).

203. *See* LOSING ISAIAH, *supra* note 181.

204. *See* King Telephone Interview, *supra* note 194.

205. For a more complete review of the *Willis* case and the Indiana parenting privilege, see Kyli L. Willis, Willis v. State*: Condoning Child Abuse in Indiana*, 14 U.C. DAVIS J. JUVENILE L. & POL'Y (forthcoming Winter 2010).

206. During the panel entitled: "Ain't Misbehavin: Family Law and Abuse," moderated by Professor Julie Shapiro, three scholars presented their research. Professor Elaine Chui presented *The Guy's a Batterer! A Public Approach to Domestic Violence in the Information Age*. Professor Evelyn Tenenbaum discussed *Adultery Between Dementia Patients in Nursing Homes: Intimacy for the Lonely or Deplorable Violation of Marital Vows?*, and my former student, Ms. Rozlyn Fulgoni-Britton spoke on *Drawing a Line on the Blackboard: Why High School Students Cannot Welcome Sexual Relationships With Their Teachers*. *See* Conference Agenda, *supra* note 5; *see also* Jennifer Drobac, Notes from "Ain't Misbehavin: Family Law and Abuse" (June 13, 2008) (on file with author). It is not often that a teacher enjoys the pleasure of inviting a student to present at an academic conference before this student even completes law school. I would like to congratulate Ms. Fulgoni-Britton here for her hard work and great success.

207. Payne, Keynote Address, *supra* note 23.

Teachers,[208] Ms. Rozlyn Fulgoni-Britton explores the legality of sexual relationships between teachers and their students,[209] particularly in light of Title IX of the Education Amendments of 1972.[210] Professor Evelyn Tenenbaum also looks at sexual relationships but she focuses on dementia patients in nursing homes in her article, *To Be or to Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery*.[211] Both writers examine the importance of legal capacity, competence, consent, power, and the role of physical confinement. While Fulgoni-Britton deals with youth,[212] Tenenbaum discusses the elderly.[213]

Legal capacity to consent to sexual activity is not an issue for most people. For youth, who the law deem limited because of developmental ability (or disability), and for the elderly who suffer from dementia, full legal capacity to consent may not exist. Ms. Fulgoni-Britton notes the statutory rape and other state laws that protect students who lack capacity from sexual predation.[214] These laws are often inconsistent and vary from state to state.[215] She argues that the unwelcomeness requirement associated with a Title IX claim of sexual harassment makes adolescents vulnerable to a trial of their own uncertain capacity and perhaps misdirected conduct.[216] She points to the Department of Education's (DOE) rebuttable presumption, that sexual conduct between an adult school employee and student is not consensual, as problematic.[217] She posits that a blanket rule banning sexual conduct between secondary students and their teachers would better serve youth at school.[218] She writes, "A bright line rule that protects *all* secondary students, regardless of relevant age of consent laws, easily can be achieved by making all students incapable of consenting to a sexual relationship with a teacher."[219]

Challenging the DOE Guidance, Fulgoni-Britton criticizes the "totality of the circumstances test" and the set of circumstances that the DOE suggests might be considered in evaluating whether a secondary student "welcomed" sexual attention from a teacher.[220] Relying on *Chancellor v. Pottsgrove School*

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208. Rozlyn Fulgoni-Britton, Note, *Drawing a Line on the Blackboard: Why High School Students Cannot Welcome Sexual Relationships with Their Teachers*, 42 IND. L. REV. 257 (2009).

209. *Id.* at 258.

210. 20 U.S.C. § 1681(a) (2006).

211. *See* Evelyn Tenenbaum, *To Be or to Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery*, 42 IND. L. REV. 675 (2009).

212. *See* Fulgoni-Britton, *supra* note 208, at 258.

213. *See* Tenenbaum, *supra* note 211, at 675.

214. Fulgoni-Britton, *supra* note 208, at 258-63.

215. *Id.* at 261-62.

216. *Id.* at 278-79.

217. *Id.* at 276.

218. *Id.* at 279.

219. *Id.* at 273.

220. *Id.* at 272-76.

District,[221] Fulgoni-Britton emphasizes the absurdity of the results possible under Title IX.[222] A teacher's sexual relationship with two different students in the same class might result in different liability determinations, depending on the students' respective ages, mental capacity, and the circumstances of sexual activity.[223] Fulgoni-Britton does not reject the unwelcomeness requirement completely, however.[224] She reasons, "Welcomeness should not be completely removed from Title IX analyses because of cases involving college and graduate students in which the majority of students are over the age of eighteen."[225] Adult students, she believes, should navigate the law as currently composed.[226]

While Ms. Fulgoni-Britton advocates a blanket ban on sexual activity between high school students and their teachers,[227] Professor Tenenbaum recommends a more nuanced and individualized approach with dementia patients who may still exhibit much functional and cognitive competence.[228] Tenenbaum does not challenge a ban on staff-patient sexual relationships; she examines only those sexual relationships between patients that may be nonconsensual or objected to by nonresident family members.[229] Documenting the benefits of intimacy and sexual activity for elderly adults, Tenenbaum suggests that a blanket ban on sexual relationships for these adults might do more harm than good.[230] She stresses the isolation from former sexual partners and confinement away from family and friends in exploring the importance of new intimate, comforting, and sexual relationships.[231] She also highlights the legal interests in privacy and autonomy that adults traditionally enjoy.[232]

Acknowledging the chance for abuse, Tenenbaum considers several ways to protect dementia patients from sexual predators and from family members whose interests may conflict.[233] She rejects control by relatives, substituted judgment, and a best interests test because each of these methods fails to account for continuing functional competence and personal autonomy and privacy.[234] Instead, she proffers a four-step approach for the evaluation of functional competence to choose engagement in sexual activity in an adulterous relationship.[235] The first step involves confirming that the patient can somehow,

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221. 529 F. Supp. 2d 571 (E.D. Pa. 2008).
222. Fulgoni-Britton, *supra* note 208, at 276-77.
223. *Id.* at 278-79.
224. *Id.* at 279.
225. *See id.*
226. *See id.* at 278-80.
227. *Id.* at 280-83.
228. *See* Tenenbaum, *supra* note 211, at 713-16.
229. *See id.*
230. *See id.* at 680-81.
231. *See id.* at 681.
232. *See id.* at 685.
233. *See id.* at 691-95.
234. *See id.* at 713-16.
235. *Id.*

even if not verbally, express his or her desires.[236] The second step requires a consideration of the "critical interests" of the patient.[237] She highlights three such critical interests: 1) the patient's interest in protecting family members' feelings, including those regarding infidelity, 2) the patient's interest in being remembered after death in a particular way, and 3) the religious directives that the patient may value.[238]

The third step calls for an analysis of whether the patient can adequately consider the critical interests detailed in the second step.[239] Finally, if the patient cannot adequately engage in the reasoning and analysis required by the first three steps to come to a decision, a fourth step functions to assure that the nursing home staff will balance the patient's interest in continued adulterous sexual activity with the other identified critical interests.[240]

One could argue that this four-step process might prove useful to Fulgoni-Britton's adolescent students. Unfortunately, the critical interests that apply for dementia patients do not readily translate for youth who may not have been sexually active previously and are not already married. These teenagers are not yet concerned with how they will be remembered after death and may not have well-defined religious values. In sum, a minor's lack of established mental capacity, her fewer life experiences, and different priorities significantly distinguish her from the dementia patients that once enjoyed full legal capacity. Even more important, Fulgoni-Britton addresses sexual activity not amongst students, but between a teacher and student.[241] The power differential in that relationship much more closely resembles the relationship between nursing home staff and patient that Tenenbaum rightly exempts from her analysis.

With her notes on the elderly, Tenenbaum and the other presenters featured in this law review volume descant the discrete family law issues that have challenged legal maestros for decades and longer.[242] While complex and

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236. *Id.* at 713-14.

237. *Id.* at 714-15.

238. *Id.* at 714.

239. *Id.* at 715.

240. *Id.* at 716.

241. Fulgoni-Britton also emphasizes that the teacher-student relationship is more like a parent-child relationship for which no one would dispute that sexual activity is inappropriate. She writes, "Clearly there is no question of welcomeness involved in parent-child sexual relationships. However, the question is raised in teacher-student relationships even though the relationship encompasses many of the same features of a parent-child relationship." *See* Fulgoni-Britton, *supra* note 208, at 267.

242. Numerous other panelists also delved into interesting and challenging family law issues. For example, in their panel "Cherokee: Issues Under the Indian Child Welfare Act," moderated by Professor Sheila Simon, Professor Patrice Kunesh delivered *Cultural Identity Considerations in Jurisdictional Disputes Involving Indian Children Outside Reservation Boundaries* and Professor Jacquie Hand presented *Indian Children, Indian Parents, and Indian Tribes: The Whys and Hows of Treating Indian Children Differently*. *See* Conference Agenda, *supra* note 5; *see also* Jennifer Drobac, Notes from "Cherokee: Issues Under the Indiana Child Welfare Act" (June 13, 2008) (on

nuanced, these refrains lend themselves for review by legal practitioners and theorists. New arrangements promise more harmony and fewer skipped beats. Some scores, however, are just too complex for a single instrument. The dissonant blast of a natural disaster, such as a hurricane, requires symphonic response.

D. Family Law in a Disaster

In the final ground-breaking article featured in this volume, *Katrina Disaster Family Law: The Impact of Hurricane Katrina on Families and Family Law*,[243] Ms. Sandie McCarthy-Brown and Professor Susan Waysdorf review the effects of a natural disaster on the functioning of family law.[244] One of the first analyses of its kind, their article explores how our legal system adjusts when there is no family home due to damage or complete destruction.[245] What if a disaster destroys not only homes, but also schools and government buildings? As our conference began, massive floods crippled southern Indiana.[246] In the midst of the flooding, private citizens and government officials, including Director Payne, questioned prior preparedness, particularly in the aftermath of Katrina.[247] The response by McCarthy-Brown and Waysdorf is not encouraging but should cause us to adapt and begin planning for future natural disasters. Their herald calls us to action in Indiana and across the country.

McCarthy-Brown and Waysdorf emphasize that the consequences of Katrina comprise a social justice issue because of the disproportionate impact on women, children, the poor, and the disabled.[248] After detailing some of the demographic effects of the Katrina diaspora,[249] these scholars track the legal issues that

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file with author).

243. *See* Sandie McCarthy-Brown & Susan L. Waysdorf, *Katrina Disaster Family Law: The Impact of Hurricane Katrina on Families and Family Law*, 42 IND. L. REV. 721 (2009). Just as I mentioned with regard to Ms. Fulgoni-Britton, I congratulate my former student, Ms. McCarthy-Brown. After graduating from Indiana University School of Law—Indianapolis in 2005, Ms. McCarthy-Brown moved with her son to New Orleans to help with the post-Katrina devastation there. She stayed and currently works at The Pro Bono Project-New Orleans, providing disaster- and non-disaster related legal services to low-income individuals and families and to not-for-profit organizations that serve low-income families. Ms. McCarthy-Brown also manages the case load of The Project while overseeing the work of a bank of national volunteer attorneys and law students who handle those cases. She is a credit to her alma mater and I thank her here for her courage and service.

244. *See id.* at 722-23.

245. *See id.*

246. *See* WHTR.com Eyewitness News, *1 Dead, 1 Missing in Indiana Flood: Severe Flooding Grips Portion of State*, http://www.theindychannel.com/news/16542019/detail.html (June 8, 2008, 20:13 EDT).

247. *See, e.g.*, Payne, Keynote Address, *supra* note 23.

248. McCarthy-Brown & Waysdorf, *supra* note 243, at 735-36.

249. *Id.* at 733-36.

plagued the at-risk groups. Beginning with the family home, McCarthy-Brown and Waysdorf discuss evictions, succession issues—for accessing insurance and other benefits, and pervasive homelessness.[250] They explain:

> For many homeowners, particularly poor, African-American homeowners, the issue of succession, or gaining clear legal title, was the first challenge.... As family members passed away, the next generation lived in the house without changing the recorded owner....
>
> Over the years, family members had paid taxes and even taken out and paid for insurance policies on these houses. Yet, after the Storm, FEMA would not accept claims for subsidies and assistance without proof of titled ownership. Moreover, homeowners could not successfully file insurance claims without clear title.[251]

Thus, many of the people who needed assistance the most could not readily access government aid or private insurance.[252] The name on the title disqualified women, children, and families from relief.[253] Not since the days before the Married Women's Property Acts of the late nineteenth century has title arguably caused such hardship for families.[254]

This property title problem (among numerous other reasons) also resulted in increased divorce filings as couples who had been living separate and apart but who had never formally divorced tried to formalize their prior casual arrangements and property divisions.[255] McCarthy-Brown and Waysdorf suggest that "tremendous amounts of community property are jointly owned by people who no longer have a social connection to each other. When a disaster occurs, finding a long-lost spouse, a lawyer (or two), and navigating the divorce process is one more significant source of stress."[256] Such stress leads to increased domestic violence[257] and greater need for psychological services in a community already grossly underserved.[258] McCarthy-Brown and Waysdorf document numerous ways that Louisiana quirks of law and local customs worked additional serious hardships on residents devastated by the hurricane.[259]

Their discussion of the New Orleans children strangely echoes Director

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250. *See id.* at 738-42.

251. *Id.* at 739-40 (footnotes omitted).

252. *See id.*

253. *Id.*

254. *See* NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 4 (2006) (explaining that the Married Women's Property Acts allowed women to control their own property).

255. McCarthy-Brown & Waysdorf, *supra* note 243, at 742-46.

256. *Id.* at 744-45.

257. *Id.* at 746-48.

258. *See* Jodi L. Kamps, *Reflections on Hurricane Katrina and Its Impact: One Psychologist's Experience*, 39 PROF. PSYCHOL. RES. & PRAC. 7, 9 (2008) (noting "a recent outflow of psychiatrists, including child psychiatrists, from New Orleans area").

259. *See generally* McCarthy-Brown & Waysdorf, *supra* note 243, at 738-65.

Payne's discussion of abused and neglected children.[260] Like many foster-care children, Katrina "[c]hildren lost their physical possessions, connection to their culture, friends, and support systems, all in an instant."[261] Many of these children, because of the operation of Louisiana divorce law, did not have legally established custodial arrangements with their divorced (or long separated) parents.[262] Relocation issues, custody disputes, and visitation modifications all made life for these children even more uncertain and stressful as their parents also dealt with the housing, health care, and financial problems.[263] McCarthy-Brown and Waysdorf give concrete examples of the chaos that results when disaster relief efforts do not adapt to local law and customs.[264]

Similarly, they recommend reform and re-evaluation of state and local law to anticipate future disasters.[265] They urge court systems everywhere to plan now for disasters so that judicial systems can adequately serve those most at risk and avoid the collapse that befell New Orleans.[266] For example, they note that

> custody relocation laws, standards, and cases, perhaps more starkly than other areas of family law, have been shaken by the mass displacement and dislocation of hundreds of thousands of parents during Katrina. Judges, lawyers, family law experts and legislators should review this post-Katrina experience and initiate a process of evaluation and reform of these traditional and, at times, conflicting approaches to relocation in custody cases.[267]

One reform approach that these scholars celebrate is Louisiana's adoption of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[268] Reducing interstate conflict, uniform laws help people navigate across state borders during a disaster. Moreover, folks who draft such uniform laws can anticipate the types of problems that often result in a natural disaster. McCarthy-Brown and Waysdorf argue, "[t]he UCCJEA provides better protection for children, especially if enacted pre-disaster, by creating consistency in the legal process and court decisions. A judge who is familiar with the case and the family history can issue rulings which better protect a child . . . ."[269] One judge, one family? Sounds familiar![270]

Another familiar chord in the Katrina article and one on the top of the family

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260. *See id.* at 752-58 (describing the hardships child custody laws create for single parents who fled New Orleans).

261. *Id.* at 748.

262. *Id.* at 749.

263. *Id.* at 750-58.

264. *Id.* at 750-60.

265. *Id.* at 765.

266. *Id.*

267. *Id.* at 758.

268. *Id.* at 758-60.

269. *Id.* at 760.

270. *See supra* note 49 and accompanying text.

law score for many scholars and practitioners are their notes on same-sex families.[271] These families, when unprotected and invalidated by state and federal law, face particular hardship during a natural disaster.[272] McCarthy-Brown and Waysdorf briefly highlight the problem:

> An issue of great importance to non-traditional couples in the wake of a disaster is whether relief programs will recognize the surviving partner as the legal spouse for purposes of benefits and other relief. For those couples who have children, issues of child custody relocation, cross-adoption by both parents, and related matters will rise to the fore in the wake of a disaster, particularly if one of the adults dies or is severely injured in the disaster.[273]

This passage only hints at the complexity of the troubles possible as a consequence of disaster.

McCarthy-Brown and Waysdorf's comments fit neatly within this Article's review of same-sex marriage. Moreover, the controversy created by the November 4, 2008, passage of California's Proposition 8, which now prohibits same-sex marriage in California,[274] extends beyond California's borders.[275] Imagine a lesbian couple, Alice and Zoe, not from New Orleans but from California. Suppose that Alice and Zoe married in San Francisco in June 2008. In late November 2008, Alice gave birth to Ben, via artificial insemination. Because Ben was a child of the marriage, Zoe did not think that she had to adopt him and assumed that she was listed as the second parent on the birth certificate. Further suppose that a hospital official, uncertain about the ramifications of Proposition 8, might not have listed Zoe, the non-birth mother, on Ben's certificate.

Now imagine a huge and devastating earthquake near San Francisco. Mass displacements. Destruction of facilities and infrastructure. Gas fires and aftershocks. Families and children are separated. Zoe is severely disabled and moves back to Indiana with Ben to be with relatives while Alice tries to secure their property and rebuild in California. However, Indiana[276] (and the federal government[277]) will not recognize their marriage and authorities deny social security benefits and other relief benefits for Ben and the family. Because of the lack of documentation and because Zoe never adopted Ben, she is arguably a legal stranger to the child and under Indiana law has no obligation to support him. Theoretically, she cannot even consent to routine well-baby care for Ben because Indiana law might not regard her as his legal parent or qualified

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271. McCarthy-Brown & Waysdorf, *supra* note 243, at 762-64.

272. *See id.*

273. *Id.* at 764.

274. *See generally* Strauss v. Horton, 207 P.3d 48 (upholding Proposition 8 as a valid constitutional amendment, but holding that marriages prior to its enactment remained valid).

275. *See* Audi et al., *California Votes for Prop 8*, *supra* note 9.

276. IND. CODE § 31-11-1-1(b) (2008).

277. Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006).

consenting adult.[278]

The stress of the earthquake, the displacement, and the legal red tape take a toll on the marriage. Zoe decides that she wants a divorce but cannot obtain one in Indiana since Indiana refuses, as a matter of public policy, to recognize her marriage to Alice.[279] Her disability and the devastation in California prevent her from moving back there to secure legal closure. Months pass. Thinking that her marriage is null and void in Indiana, Zoe falls in love with and marries Chuck. Now she is possibly a bigamist under California law and faces possible prosecution if she moves back.[280] She will probably lose custody of Ben if Alice, the birth mother, sues for custody. Legal limbo, voter discrimination, and natural disaster create legal chaos.

The Alice and Zoe hypothetical is the material from which family law class examinations are made (including mine from this year).[281] The problem is that all of these issues could arise—in Indiana and many other states. Events in New Orleans researched by McCarthy-Brown and Waysdorf confirm how bizarrely and inadequately the law sometimes operates.[282] McCarthy-Brown and Waysdorf are correct that the adoption of uniform laws, reforms, and private contractual planning might all improve a family's chance of survival post-disaster—whether or not that family is a same-sex or traditional family. However, Professor Simon reminds us:

> [B]oth in creating and dissolving a family, the trend in American law is increased opportunity for individuals to make their own choices. . . .
>
> Expanded freedoms allow us to be who we are, and contribute our best to a free market and democracy. Our families are not just what we do along the way, but who we are. Families are the most important area for humans to be able to express themselves."[283]

Professor Simon's words ring true. However, members of our democracy have refused to extend—and have even withdrawn—rights and legal recognition for many "untraditional" families.[284] Additionally, the desire for freedom creates a tension with the need for structure and predictability, another familiar refrain.

So is the law progressive, or discriminatory and protective of entrenched

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278. *See, e.g.*, IND. CODE § 16-36-1-5 (2008) (enumerating persons authorized to consent to medical care for minors, while failing to discuss nonmarital partners of a biological parent).

279. *Id.* § 31-11-1-1(b).

280. *See* CAL. PENAL CODE § 281 (West 2008) (criminalizing bigamy).

281. *See also* Singer, *supra* note 110, at 35-36 (discussing the hypothetical case of Lily and Anne).

282. McCarthy-Brown & Waysdorf, *supra* note 243, 753-55 (recounting the holding in *McLain v. McLain* in which the court found that a mother did not meet the requirement of good faith when she did not return after evacuating with her child for Katrina).

283. Simon, *supra* note 88, at 576.

284. *See, e.g.*, Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GEORGIA L. REV. 349, 374-379 (2007) (discussing alternative family structures that current family laws fail to protect).

interests? It is both . . . and will be what we make it in the future. The question is how hard we will work to make new law and create innovation. Professor Simon warns that family law scholars and teachers—most of whom are women—"can expect our ideas to be discounted or criticized with ease."[285] She suggests, however, "Outsiders built a new musical culture [Jazz], and similarly, outsiders can build family law in ways that move beyond previous limitations."[286] With this conference we moved beyond previous limitations . . . and all that jazzzzzzzzz.

285. *See* Simon, *supra* note 88, at 580.

286. *Id.*

JAZZ AND FAMILY LAW: STRUCTURES, FREEDOMS, AND SOUND CHANGES

SHEILA SIMON*

Comparisons help us learn, and thanks to the Midwest Family Law Conference, "Jazzing up Family Law," we can learn what jazz teaches us about family law. Studying law through music is not a new idea. In fact, it has been around since Plato.[1] Also, jazz has been a source of comparison in studying democracy,[2] adjudication,[3] critical race theory,[4] property law,[5] and mediation.[6] At least two jazz musicians have described their dedication to music in terms of family status.[7] Thus, exploring family law through jazz provides insight into what is already known.

Jazz is more American than apple pie because we invented this particular apple. Jazz is an art form born in the United States around the early 1900s,[8] and its impact goes well beyond the time and place of its origin.[9] Jazz is hard to

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1. Alfred C. Aman, Jr., *Studying Music, Learning Law: A Musical Perspective on Clinical Legal Education*, 13 CORNELL L.F. 8, 9 (1987) (suggesting that studying law in the way we study music, both learning the theory and putting it to work, could be beneficial); Desmond Manderson & David Caudill, *Modes of Law: Music and Legal Theory—An Interdisciplinary Workshop Introduction*, 20 CARDOZO L. REV. 1325, 1325 (1999) (citing PLATO, THE REPUBLIC OF PLATO (Allan Bloom trans., 2d ed. 1991)).

2. Lani Guinier, *More Democracy*, 1995 U. CHI. LEGAL F. 1, 1-3 (discussing the participatory and cooperative nature of baseball and jazz as similar to democratic ideals).

3. Christopher A. Bracey, *Adjudication, Antisubordination, and the Jazz Connection*, 54 ALA. L. REV. 853, 856 (2003) (discussing free jazz as a guide for how the judiciary should value expression of all voices).

4. *See generally* Jonathan A. Beyer, *The Second Line: Reconstructing the Jazz Metaphor in Critical Race Theory*, 88 GEO. L.J. 537 (2000).

5. *See generally* Amy Leigh Wilson, *A Unifying Anthem or Path to Degradation?: The Jazz Influence in American Property Law*, 55 ALA. L. REV. 425 (2004).

6. *See generally* John W. Cooley, *Mediation, Improvisation and All that Jazz*, 2007 J. DISP. RESOL. 325.

7. Louis Armstrong said, "When I picked up that horn, that's all. . . . That's why I married four times." NAT HENTOFF, JAZZ IS 69, 71 (1976). Martye Awkerman said, "This guy wanted to marry me. He said, 'It's me or the horn.' I said, 'Well, it ain't you, babe.'" SHERRIE TUCKER, SWING SHIFT: "ALL-GIRL" BANDS OF THE 1940S, at 317 (2000).

8. FRANK TIRRO, JAZZ: A HISTORY 51-52 (1977) (arguing that an exact birthday for jazz is hard to determine, because some consider blues and ragtime to be early forms of jazz).

9. HENTOFF, *supra* note 7, at 122-23. For being 100 years old, jazz still gets around pretty well. The freedom of jazz was felt in the Soviet Union. *See generally* S. FREDERICK STARR, RED

define, but improvisation is its central focus.[10] This improvisation provides a freedom of expression for the musician and an expectation that the individual performer has a message.[11] This freedom of expression is a stark contrast to Western "classical" music which, while allowing for some interpretation, restricts a musician to the written notations of the composer.[12] But freedom in most jazz is not complete freedom. In most jazz there is some foundation, structure, or center.[13] The continual tension between structure and freedom in jazz has produced distinct historical eras in jazz.[14] At times, highly structured jazz was the norm.[15] In response to a perception of too much structure, formats with more freedom have since prevailed.[16]

The tension between restriction and freedom is central to family law as well. As we create and undo family relationships, we value individual decisions. We are comfortable with some indeterminacy. But we also make our individual decisions within some centrally controlled boundaries, such as fair resolution of financial relationships, and protections against harm to individuals. As with jazz, the tension between freedom and control produces changes over time.

Jazz and family law share one other trait: disrespect of the field based on the players. African-American men and women created most of what is known as jazz.[17] The players in family law are predominantly female, whether they are practitioners[18] or teachers.[19]

This Article examines the many parallels between jazz and family law and explores how an understanding of jazz can help us better understand family law. Part I looks at the history of jazz and how jazz forms have changed over the years. Part II compares jazz forms to the structures and freedoms in family law. Part III looks at who the creators of jazz were, and considers how that has influenced the perception of jazz. Part IV discusses the players in family law and how they, like the makers of jazz, may be disregarded. The Article concludes with a discussion about the values of freedom and individuality and how outsiders may be in an ideal position to make changes.

AND HOT: THE FATE OF JAZZ IN THE SOVIET UNION 1917-1980 (1983). Jazz has also gone to Latin America and come back again in the form of artists such as David Sanchez and Danilo Pérez. Howard Reich, *Fans Await Perez, Sanchez Reunion*, CHI. TRIB., May 11, 2008, § 7, at 6.

10. HENTOFF, *supra* note 7, at 110; BEN SIDRAN, TALKING JAZZ: AN ORAL HISTORY 475 (1995).

11. HENTOFF, *supra* note 7, at 283; ALYN SHIPTON, A NEW HISTORY OF JAZZ 778 (2001).

12. SHIPTON, *supra* note 11, at 6-7.

13. HENTOFF *supra* note 7, at 278-79.

14. *See generally* SHIPTON, *supra* note 11.

15. *Id.* at 269.

16. HENTOFF, *supra* note 7, at 123-24; SHIPTON, *supra* note 11, at 420.

17. PAUL LOPES, THE RISE OF A JAZZ ART WORLD 50 (2002).

18. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 102-03 (1983) (citing James J. White, *Women in the Law*, 65 MICH. L. REV. 1051, 1062-63 (1966-67)).

19. Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 U.M.K.C. L. REV. 293, 313-14 (2004).

I. THE HISTORY AND FORMS OF JAZZ

Jazz is difficult to define.[20] It has been described as "the sound of surprise,"[21] and "heat, spirit, heart, adrenaline,"[22] which only helps define the music if you know what kind of heat, spirit, and heart are required. Jazz is a conversation between musicians with the audience as an active participant.[23] Jazz has also been defined in terms of time and place as "that music which came into being in the southern part of the United States during the late nineteenth century and first blossomed in the vicinity of New Orleans at the turn of the twentieth century."[24] One author lists the most significant musical elements as groups and solo improvisation, and a focus on the performer, rather than on the composer, of the music.[25]

One reason jazz is hard to define is that jazz itself has changed many times.[26] There are no sharp boundaries, but jazz can be roughly split into the following categories: precursors to jazz, classic jazz, big band and swing, bebop, and a variety of post-bebop developments.[27]

If we could do genetic testing on early jazz we could identify at least two direct ancestors: ragtime and the blues.[28] "Ragtime" comes "from the syncopated or 'ragged'" rhythm of the music.[29] We know how ragtime sounded

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20. SHIPTON, *supra* note 11, at 4.

21. HENTOFF, *supra* note 7, at 25 (citing the definition of Whitney Balliet, jazz critic for the *New Yorker*).

22. SHIPTON, *supra* note 11, at 4.

23. INGRID MONSON, SAYING SOMETHING: JAZZ IMPROVISATION AND INTERACTION 1-2 (1996).

24. TIRRO, *supra* note 8, at 55.

25. The list of factors is:

> 1. improvisation, both group and solo; 2. rhythm sections in ensembles (usually drums, bass, and chordal instrument such as piano, banjo, or guitar); 3. metronomical underlying pulse to which syncopated melodies and rhythmic figures are added . . . ; 4. reliance on popular song form and blues form in most performances; 5. tonal harmonic organization with frequent use of the blues scale for melodic material; 6. timbrel features, both vocal and instrumental, as well as other performance-practice techniques which are characteristic of particular jazz substyles, such as vibratos, glissandi, articulations, etc.; and 7. performer or performer-composer aesthetic rather than a composer-centered orientation.

TIRRO, *supra* note 8, at 55-56.

26. SHIPTON, *supra* note 11, at v-vii.

27. *Id.*

28. TIRRO, *supra* note 8, at 53.

29. SHIPTON, *supra* note 11, at 31. To get a sense of the rhythmic change, think of John Philip Sousa's "Stars and Stripes Forever," written in 1896, then think of "The Entertainer," a Scott Joplin rag published in 1902 that was featured in the soundtrack of the movie "The Sting."

because we have sheet music published during that period.[30] In contrast, we know about the blues primarily from oral tradition.[31] Outside of oral tradition, blues were preserved by recordings starting in the 1920s.[32] Blues characteristically share a pattern of chords that repeats regularly.[33] The blues are usually built from a particular scale where two notes of the scale are flattened into what are now known as "blue notes."[34] Both the complexity of the rhythms in ragtime and the flattened blue notes can be traced to Western African musical traditions.[35]

Ragtime and blues were in the air in New Orleans in the early 1900s, but the city was big enough to include other musical influences. African American "songsters" performed music that had elements of "Irish reels" and Appalachian folk songs.[36] British and French popular songs and sailors' shanties were also heard in New Orleans at the time.[37] The music may have mixed more easily than the groups of people at the time. French New Orleans included "Creoles of Color," who lived in one area, while non-French Americans, particularly newly freed slaves, lived in another area.[38] Law stirred the mix of people when post-reconstruction politics disenfranchised African American citizens.[39] Without a voting African American community, strict local segregation codes were passed in 1894, forcing the "Creoles of Color" to move out of the French section of town and into the African American uptown area.[40] The musicians from the different sides of town had no immediate interest in fusing their divergent styles,[41] but over time their European music, ragtime, and blues intermingled.

Jazz bands emerged before the term jazz.[42] Their style often combined the coronet or trumpet of local brass bands to play a melody and a complex rhythm played on a drum set and guitar, and often a clarinet, saxophone, or trombone.[43] As jazz became an identifiable style of its own, it spread through traveling bands[44] and through the latest technology: sound recording.[45]

In the 1920s, jazz grew in popularity and the bands grew in size. Big bands

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30. TIRRO, *supra* note 8, at 52. Publication of the sheet music for the "Maple Leaf Rag" in 1899 was a commercial success for Scott Joplin. *Id.*

31. *Id.* at 115.

32. *Id.* at 117.

33. *Id.* at 119.

34. *Id.* at 121.

35. *Id.* at 38-39.

36. SHIPTON, *supra* note 11, at 6-7.

37. *Id.*

38. TIRRO, *supra* note 8, at 73.

39. SHIPTON, *supra* note 11, at 76.

40. TIRRO, *supra* note 8, at 73.

41. SHIPTON, *supra* note 11, at 77.

42. *Id.* at 96.

43. *Id.* at 89.

44. *Id.* at 96.

45. *Id.* at 105-06.

and swing bands were headed by, among others, Duke Ellington,[46] Cab Calloway,[47] Count Basie,[48] and Benny Goodman.[49] The sound was similar to the early jazz of New Orleans, but there were more reed instruments performing more and faster solos.[50] With more musicians in the band, a more central arrangement was required, often in the form of written music.[51] Despite the popularity of the music, some musicians bristled at this loss of freedom of expression.[52]

Bebop was a reaction to the controlled sounds of swing. Bebop is characterized by broader thinking in terms of both melody and rhythm.[53] The bands became smaller and the room for solos expanded.[54] As one musician noted, "Music theory . . . could be a guide, but was certainly not law."[55] The rhythm changed from a smooth dance pace to more harshly accented beats, with the onomatopoetic reference to the rhythm giving bebop its name.[56] Bebop provided more complexity than dance band music[57] and required more musical skill.[58] Performing without the rigidity of written music was the norm in bebop.[59] Bebop expanded the limits of jazz so much that the next developments in jazz were not a straight route but multiple branches, each with its own sounds.[60]

The multiple descendants of, and reactions to, bebop include classical revival, cool jazz, hard bop, free jazz, and fusion. A revival of classic jazz focused attention back on early band sounds,[61] with Louis Armstrong as a human bridge from the early years.[62] The sound of cool jazz was light and soft, focusing more on complexity than on a sense of drive.[63] The drive belonged to hard bop.[64] Hard bop emphasized speed, volume, and emotion and was sometimes labeled

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46. *Id.* at 259.
47. *Id.* at 284.
48. *Id.* at 305.
49. TIRRO, *supra* note 8, at 233.
50. *Id.* at 235.
51. SHIPTON, *supra* note 11, at 311; TIRRO, *supra* note 8, at 259.
52. TIRRO, *supra* note 8, at 259, 263.
53. *Id.* at 263, 266.
54. SHIPTON, *supra* note 11, at 408.
55. *Id.* at 420 (citing LEWIS PORTER, LESTER YOUNG (1985)).
56. TIRRO, *supra* note 8, at 266.
57. *Id.* at 266-67.
58. *Id.* at 268-69 (citing MARSHALL WINSLOW STEARNS, THE STORY OF JAZZ 157 (1970)). Dizzie Gillespie is quoted as noting that a band would changes keys in the middle of a song just to test the abilities of a new musician who wanted to sit in. *Id.*
59. *Id.* at 273.
60. *Id.* at 293.
61. SHIPTON, *supra* note 11, at 607.
62. *Id.* at 629.
63. *Id.* at 692.
64. TIRRO, *supra* note 8, at 302.

funky.[65] Free jazz took freedom a step farther than bebop. Ornette Coleman, the performer most closely associated with free jazz, created performances without a planned tune, chord progression, or structure.[66] Fusion combined jazz with elements of rock.[67]

Jazz may have had all of these changes because of its original and spontaneous nature. Not knowing where the music will go in any given performance can be challenging for both the musician and the audience. But the indeterminacy is what appeals to so many. The development of jazz shows a challenging and changing line between individuality and orchestration. We see this same theme in the development of family law.

II. FREEDOM AND CONTROL IN FAMILY LAW

The term "family" can be as hard to define as jazz. Biological and legal relationships are a starting point, but many relationships with neither of those ties are regarded as familial. Law about families is also a broad topic. The U.S. Supreme Court has considered definitions of family in cases on topics ranging from housing,[68] welfare benefits,[69] wrongful death,[70] paternity,[71] and visitation.[72] Loosely defined, family law is the law governing the creation and dissolution of significant interpersonal relationships.[73]

Family law has tensions between control and freedom that are similar to the complexities of jazz. When constructing family relationships, legislatures and courts have struggled over what relationships are protected and how.[74] When dissolving family relationships, individuals have had increased freedoms in many areas, with control remaining steady where protection of individuals is required. The decisions weighing control and freedom are difficult and seem subject to continued change.

Building a family is an extraordinarily individual decision. Children have little choice about what family they will join, but adults choose partners and decide whether to reproduce. These are decisions in which Americans rarely welcome intervention.

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65. *Id.*

66. *Id.* at 345 (citing CHARLES HAMM, *Changing Patterns in Society and Music: The U.S. Since World War II*, *in* CONTEMPORARY MUSIC AND MUSIC CULTURES 35, 68 (1995)).

67. CHRISTOPHER MEEDER, JAZZ: THE BASICS 213 (2008).

68. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 732-33 (1995); Moore v. City of East Cleveland, 431 U.S. 494, 498-500 (1977).

69. Anderson v. Edwards, 514 U.S. 143, 146-47 (1995).

70. Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968).

71. *See generally* Michael H. v. Gerald D., 491 U.S. 110 (1989).

72. Troxel v. Granville, 530 U.S. 57, 69-71 (2000).

73. BLACK'S LAW DICTIONARY 621 (7th ed. 1999).

74. *See, e.g.*, Lynn Marie Kohm, *Family and Juvenile Law*, 42 U. MICH. L. REV. 417, 423-24 (2007) (discussing the struggle to define rights of same-sex couples between state legislatures and judiciaries).

The Supreme Court has recognized that these decisions should have some guarantee of privacy. When a Connecticut law criminalized the use of contraceptives, the Supreme Court found that married people had a right to privacy, a right to be free of State control of their reproductive decisions.[75] The Court later determined that the right to privacy was not exclusive to married couples, but is also guaranteed to an individual choosing to use contraception.[76] The decision to have an abortion was also within the right of privacy, but here the court allowed some State control of health and prenatal life.[77] The tension between individual decisions and State regulation has continued to be assessed,[78] and the current Supreme Court may seek to further change the law.

The Supreme Court supported freedom for individuals when it found a Virginia ban on interracial marriage unconstitutional.[79] One generation later, the case of *Loving v. Virginia* is settled law and unlikely to be challenged. But at the time, public opinion was anything but settled in the direction of individual freedom in this area.[80]

Although we have had a guarantee of privacy in marital relationships and in heterosexual activity, homosexual conduct has not been protected from State control until recently. When the Supreme Court considered a Georgia prosecution for sodomy in 1986, the majority saw this consensual contact as more closely akin to sex crimes[81] than to protected private activity as in the earlier contraception cases.[82] In 2003, the Court reframed the question as whether adults were free to engage in private, consensual, sexual conduct.[83] The Court reexamined the history of regulation of homosexual activity in the United States,[84] cited European Court of Human Rights opinions,[85] and found that the activity was protected. The Court wrote, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[86]

Tensions between regulation and freedom are currently most visible in the state-by-state question of who may marry. In 1999, the Vermont Supreme Court

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75. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

76. Eisenstadt v. Baird, 405 U.S. 438, 448-50 (1972).

77. Stenberg v. Carhart, 530 U.S. 914, 921-22 (2000); Roe v. Wade, 410 U.S. 113, 154-55 (1973).

78. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

79. Loving v. Virginia, 388 U.S. 1, 11-12 (1967).

80. Criminal prosecution of interracial marriages continued in some states up to the date of the *Loving* decision. PHYL NEWBECK, VIRGINIA HASN'T ALWAYS BEEN FOR LOVERS: INTERRACIAL MARRIAGE BANS AND THE CASE OF RICHARD AND MILDRED LOVING 63 (2004).

81. Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

82. *Id.* at 190.

83. *Lawrence*, 539 U.S. at 564.

84. *Id.* at 572.

85. *Id.* at 576.

86. *Id.* at 579.

held that the state's constitution required that same sex couples be able to enjoy the benefits of marriage.[87] The court left the mechanism for how these benefits could be established to the state legislature,[88] which chose to establish a civil union system.[89] In 2003, the Massachusetts Supreme Court found that the State could not prohibit marriage between people of the same sex under the Massachusetts Constitution.[90] And most recently in California, which had a system of recognizing same-sex domestic partnerships,[91] the state's high court ruled that the California Constitution guarantees same-sex couples the same rights to marriage as opposite sex couples.[92] After the California ruling, New York Governor David Paterson directed New York agencies to revise state policies and recognize same-sex marriages from other jurisdictions.[93] All this comes in an environment where federal law defines marriage as only between a man and a woman[94] and does not require states to recognize a marriage from any other state between people of the same sex.[95]

There is an intuitive understanding of the need for freedom in building a significant interpersonal relationship. That freedom comes in the form of privacy and equality guarantees in the U.S. Constitution, and in a variety of guarantees in state constitutions. The freedoms have not been automatically granted, and many have come in response to criminal prosecution for what was later held to be protected activity.[96] The freedoms have come slowly, and often only after a long-held understanding of the ability of the State to restrict or prevent the conduct.

Dissolving family relationships presents the same tensions between individual freedoms and governmental control. The competing interests are evident in grounds for divorce, domestic violence, child custody, financial support, and child abuse and neglect cases.

Grounds for dissolution of marriage show tight governmental control giving way to more individual freedom. In 1897, a manual on domestic relations noted that adultery was grounds for divorce, and, in some jurisdictions, conviction of a crime could also justify divorce.[97] No other grounds were contemplated.[98] In

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87. Baker v. Vermont, 744 A.2d 864, 867 (Vt. 1999).

88. *Id.* at 886-87.

89. CONN. GEN. STAT. ANN. §§ 46b-38aa to -38pp (West 2004 & Supp. 2008).

90. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

91. *In re* Marriage Cases, 183 P.3d 384, 397-98 (Cal. 2008), *superseded by const. amend.*, CAL. CONST. art. 1, § 7.5.

92. *Id.* at 433-34, 453.

93. Jeremy W. Peters, *New York Backs Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at A1.

94. 1 U.S.C. § 7 (2006).

95. 28 U.S.C. § 1738C (2006).

96. *See* Loving v. Virginia, 388 U.S. 1, 11-12 (1967).

97. MARSHALL D. EWELL & JAMES W. LA MURE, A MANUAL OF THE LAW OF DOMESTIC RELATIONS 53-54 (1897).

98. *See id.*

the last 100 years, grounds requirements have loosened greatly. In Illinois, for example, there are multiple grounds, including extreme and repeated mental cruelty and living separately after an irretrievable breakdown of the marriage.[99] The trend increasing access to divorce has had one interesting twist, covenant marriage. Three states currently allow covenant marriage, where a couple can choose to limit their grounds for divorce in the future.[100] The covenant marriages are certainly a restriction, but a voluntary one, and are not imposed by the state. Covenant marriages are, in an odd sense, an extension of freedom, because they give couples an option they may choose to use in forming their marriage.

Resolving child custody disputes is another part of the law where rigidity has given way to more options. In the early history of our country the father was presumed to be the custodian of children after divorce. At that time, many States adopted a "tender years" presumption, which favored the mother as custodian.[101] Now custody decisions focus on the best interests of the child, determined through circumstances unique to the family.[102] The change has been from predictability based on gender to indeterminacy based on a focus on individual families.

Financial support after dissolution of a family is one area that retains central control and orchestration. Child support in particular is subject to a variety of formulae for calculation, with some input from federal law.[103] Spousal support is less rigid, with recent decisions taking into account factors as diverse as home schooling of children, rental income, stock market losses, fault, and need.[104]

Removing a child from a family due to abuse or neglect is another area where state control and family independence clash. The widely publicized case in which Texas child welfare removed children from the Yearning for Zion Ranch illustrates the tensions well.[105] A trial court allowed the children's removal, but the appellate court and the Texas Supreme Court found that the children's removal was not warranted.[106] It is difficult to determine whether court and public attention are focused more on the allegations of sexual abuse or the

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99. 750 ILL. COMP. STAT. ANN. 5/401 (West 1999). As a family law practitioner in Illinois, the author's experience has been that "extreme" mental cruelty is not required to be extreme at all.

100. ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2007); ARK. CODE ANN. §§ 9-11-801 to -811 (West 2004); LA. REV. STAT. ANN. § 9:307 (2008).

101. See *Ex Parte Devine*, 398 So. 2d 686, 686 (Ala. 1981), for a discussion of the history of these presumptions, along with a rejection of any gender-based presumption.

102. For example, see the factors that Illinois requires a court to consider in determining the best interests of the child. 750 ILL. COMP. STAT. 5/602 (West 1999 & Supp. 2008).

103. *See generally* Jo Michelle Beld & Len Biernat, *Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting*, 37 FAM. L.Q. 165 (2003).

104. Linda Elrod & Robert G. Spector, *A Review of the Year in Family Law 2006-2007: Judges Try to Find Answers to Complex Questions*, 41 FAM. L.Q. 661, 671-72 (2008).

105. *See generally In re* Tex. Dep't of Family & Protective Servs., 255 S.W.3d 613 (Tex. 2008).

106. *Id.* at 615.

interest in polygamy.

Taking apart a family requires a balance of State control and individual autonomy. In general, the law has moved away from rigid central control and toward individual autonomy. Physical and financial protection of children are still subject to state control, but increased power for individuals is evident in access to divorce and options for child custody. Overall, in both creating and dissolving a family, the trend in American law is increased opportunity for individuals to make their own choices.

The trend toward individuality in family law reflects the best of jazz. In both fields there is a tension between control and individualism. In early jazz, there was the beginning of musical freedom, and then the pendulum swung to swing, with more restrictions on rhythm, melody, and harmony. Bebop was the revolution back to greater improvisation, which in turn lead to a branching out of musical possibilities. Individual expression is the essence of jazz.

Similarly, family law struggles with the balance between central control and improvisation. Like a steady rhythm that is the foundation of some jazz, the law offers protections to children. But when dealing with adults in the process of building and taking apart families, the law reflects the expanded possibilities of bebop and post-bebop. Expanded freedoms allow us to be who we are, and contribute our best to a free market and democracy. Our families are not just what we do along the way, but who we are. Families are the most important area for humans to be able to express themselves.

III. JAZZ CREATORS AND THE COLORING OF PERCEPTION

Art forms are all about perception and who the artist is can have an impact on how that work is perceived. Jazz has been created predominantly by African American men and women,[107] and that has helped to make jazz suspect by society at large.[108] This is seen in the words used to describe this art and the reactions to developments in jazz.

The word jazz, sometimes spelled jass, was used in print starting in 1917.[109] The origins of the word are entirely unclear. It is possibly of African or Arabic origin, or possibly a derivation of the French word jaser, which refers to an animated conversation.[110] It may have originated from the West Coast of the United States, where it referred to sex and enthusiasm.[111] It is also possible that the word is derived from the Irish teas, pronounced "jazz," which is a reference to heat and passion.[112]

Singers in many musical genres use nonsense syllables, but in jazz it is called

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107. LOPES, *supra* note 17, at 50.

108. TIRRO, *supra* note 8, at 266.

109. SHIPTON, *supra* note 11, at 31; TIRRO, *supra* note 8, at 51.

110. TIRRO, *supra* note 8, at 53.

111. SHIPTON, *supra* note 11, at 100.

112. DANIEL CASSIDY, HOW THE IRISH INVENTED SLANG: THE SECRET LANGUAGE OF THE CROSSROADS 65-67 (2007).

scat, a term that also means animal excrement.[113] And unlike the term bebop, which is onomatopoetic,[114] there is no indication that the word scat is reflective of the sound produced by the singer. At least one current jazz singer rejects use of the word scat because of its origins.[115]

Another earthy term has been attached to one mode of post-bebop jazz: funk. Funk was originally a term for a strong smell, particularly one coming from sexual activity.[116] Musician Quincy Jones has stated a preference for the term soulful to avoid the embarrassment associated with funk.[117]

With jazz, scat, and funk, some fundamental concepts of this art form are references to bodily functions and smells. These ideas show that the music was not well regarded. This lack of respect is made possible because the artists themselves are disregarded.

Jazz has had its critics from the start, with many of the criticisms fading away long before the music. The oldest critiques are overtly racist, such as this passage that appeared in the August 1921 issue of *The Ladies Home Journal*:

> Jazz originally was the accompaniment of the voodoo dancer, stimulating the half-crazed barbarian to the vilest deeds. The weird chant . . . has also been employed by other barbaric people to stimulate brutality and sensuality. That it has a demoralizing effect upon the human brain has been demonstrated by many scientists.[118]

If jazz as created by African American men earned little respect, jazz created by African American women barely came to the public's attention. For example, in the 1930s, Cab Calloway stood out as one of the few musicians who was both a vocalist and a bandleader.[119] His sister Blanche performed the same roles,[120] but is rarely mentioned in jazz histories. Only slightly less obscure is the International Sweethearts of Rhythm, the most popular all-female swing band of the 1940s.[121] These all-female bands were expected to be both glamorous and musically talented.[122]

But even after jazz as a genre had established itself, there were criticisms of

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113. RANDOM HOUSE WEBSTER'S DICTIONARY (2d ed. 1987).

114. TIRRO, *supra* note 8, at 266 (citing THE NEW YORKER 158 (Nov. 7, 1959)).

115. *All Things Considered: Esperanza Spalding: Voice of the Bass* (NPR radio broadcast May 15, 2008), *available at* http://www.npr.org/templates/story/story/php?storyId=90478162.

116. SHIPTON, *supra* note 11, at 671 (citing JEAN-PAUL LEVET, *"Funky," in* TALKIN' THAT TALK: LE LANGUAGE DU BLUES ET DU JAZZ (1992)).

117. *Id.*

118. LOPES, *supra* note 17, at 51. Paul Whiteman, an orchestra conductor around the same time wrote of a medical director at a girls' school who found jazz, "as harmful and degrading to the civilized races as it has been among the savages from whom we borrowed it." SHIPTON, *supra* note 11, at 205 (citing PAUL WHITEMAN & MARY MARGARET MCBRIDE, JAZZ (1926)).

119. SHIPTON, *supra* note 11, at 287.

120. *Id.*

121. *Id.* at 355-56.

122. TUCKER, *supra* note 7, at 11-12.

new developments within jazz. At each stage of jazz development, certain sounds were considered off-limits, or were at least regarded as a lesser product.[123] For example, in 1965, Duke Ellington was nominated for a Pulitzer Prize, recommended by the award's jury, but rejected by the final board because his music was not serious enough.[124] Ornette Coleman, who is now considered a great jazz innovator,[125] was said to have driven people out of clubs when he and his group played.[126] Jazz critic Nat Hentoff acknowledges that his early criticism of John Coltrane as strident and unpleasant missed the mark, and that Coltrane was in fact an amazing innovator, "one of the most persistent . . . in jazz history."[127] The musicians themselves shared a feeling that jazz was not respected as it should have been.[128] Dizzy Gillespie noted, during the height of jazz's popularity:

> [J]azz . . . has never really been accepted as an art form by the people of my own country. . . . I believe that the great mass of the American people still consider jazz as lowbrow music. . . . To them, jazz is music for kids and dope addicts. Music to get high to. Music to take a fling to. Music to rub bodies to. Not "serious" music. Not concert hall music.[129]

Race has certainly played a role in the public perception of jazz. Outright racism attacked the early development of the genre. Later developments were greeted with hostility or disregard. Even the vocabulary of the art shows a low regard. Because jazz is not just a set of musicians but a cultural movement,[130] it can be hard to identify why jazz has been disregarded. But somewhere at the intersection of race, change, and indeterminacy, American culture has struggled with giving jazz full credit as an art form.

IV. PLAYERS IN FAMILY LAW AND THE IMPACT OF GENDER

Just as jazz has been viewed as less serious music, based at least in part on race, family law is viewed as less significant because of gender. Where law was once an exclusively male field,[131] women are now a significant part of the field.

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123. HENTOFF, *supra* note 7, at 207-08.

124. Peter Margulies, *Doubting Doubleness, and All That Jazz: Establishment Critiques of Outsider Innovations in Music and Legal Thought*, 51 U. MIAMI L. REV. 1155, 1155 (1997).

125. SHIPTON, *supra* note 11, at 774.

126. *Id.* at 773.

127. HENTOFF, *supra* note 7, at 207-08.

128. LOPES, *supra* note 17, at 1.

129. *Id.* (quoting Dizzy Gillespie, *Jazz Is Too Good for Americans*, ESQUIRE, June 1957, at 55, 55).

130. *Id.* at 2; *see also* UPTOWN CONVERSATION: THE NEW JAZZ STUDIES 2 (Robert G. O'Meally et al. eds., 2004).

131. Even the U.S. Supreme Court agreed that Illinois could prevent women from obtaining law licenses. Justice Bradley, in a famous concurring opinion, wrote, "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of

But women are not distributed evenly throughout areas of practice. Family law is one of the areas where women have concentrated, both in practice and in teaching.

As women began to practice law, many were steered into areas where the practice fit the image of a woman lawyer.[132] One of the areas where women were seen as a good fit by the legal gatekeepers was family law, with almost half of all women lawyers practicing some family law in 1967.[133] Male attorneys viewed family law as a less than ideal practice area because so much of the practice involves interpersonal issues rather than strictly legal issues.[134] Family law is also considered a lesser field because it is associated with a smaller income.[135] Steering women into family law continues. In a 2004 American Bar Association publication on women in law, in a section on career choices, the author notes, "[F]ields involving representation of women and children, like family law, have been considered naturally suited to women lawyers."[136] A later chapter in the same book, "Appearances Are Everything," addresses topics including shoes, hemlines, and pants.[137]

Women have found a place not just in the practice of family law, but also in teaching family law. A 2002 study found that although thirty-one percent of the nation's law school faculty are women, fifty-eight percent of family law teachers are women.[138] Family law is in a class of only five subject areas that are taught more by women than men.[139] The other subjects are juvenile law, women and the law, legal research and writing, and poverty law.[140] These courses are perceived as being lower in status than other courses.[141] This drop in status and or pay is commonly associated with entrance of a large number of women into a particular job field.[142]

Women may choose to work in family law, and they have lots of encouragement to do so. Family law fits with the societal perception of women's roles and skills. As a special reward for practicing or teaching in this area, women receive less status and pay.[143]

Jazz musicians, who were predominantly African American, were often

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the Creator." Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872).

132. EPSTEIN, *supra* note 18, at 102-03.

133. *Id.* (citing James J. White, *Women in the Law*, 65 MICH. L. REV. 6 (1967)).

134. *Id.* at 110.

135. *Id.*

136. PHYLLIS HORN EPSTEIN, WOMEN-AT LAW 75 (2004).

137. *Id.* at 128-43.

138. Kornhauser, *supra* note 19, at 302, 329-31.

139. *Id.* at 313.

140. *Id.*

141. *Id.* at 297 (citing Deborah Jones Meritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 217 n.60 (1997)).

142. *Id.* at 317.

143. EPSTEIN, *supra* note 18, at 102-03; Kornhauser, *supra* note 19, at 317.

disregarded and criticized. Women jazz musicians had it even harder, being more easily ignored even while wearing glamorous gowns. Family law practitioners and teachers, predominantly female, have received similar treatment. This feminized area of law is regarded as lower status partly because of gender. Tossing on high heels and glamorous gowns does not seem to have worked for anyone.

CONCLUSION: ENDING ON A RESOLVING NOTE

Jazz and family law share a tension between structure and freedom. Some structure allows musicians and family members to work together. But too much structure can inhibit expression of who we are as musicians and humans. Restrictions on expression will predictably be met with attempts to secure more freedom.

We learn from the history of jazz that expansion of freedoms is treated with disdain, at least initially. Jazz pioneers of different eras could count on a lack of respect for their artistic work. There are a number of reasons why there has been a lack of respect for jazz pioneers. Jazz is unpredictable, and part of the pleasure is listening for change in a melodic or rhythmic line. This unpredictability and change can be uncomfortable for some listeners. Discounting a new idea is easier, especially when the new idea comes from a person who occupies a lower societal status.

Pioneers in family law can expect the same kind of reaction to new ideas they propose. Family law starts with a great amount of indeterminacy, requiring information on particulars of each family before a legal conclusion can be reached. In addition to that lack of predictability, which alone can make people uncomfortable, practitioners and teachers of family law can expect to be treated as lesser citizens of the legal world. We can expect our ideas to be discounted or criticized with ease.

In jazz, the earliest improvisations were followed by a more rigid swing sound, which was then followed by renewed emphasis on improvisation. Family law may have to follow a similar course. We have seen a history of expansion of freedoms, but the current Supreme Court could retract some of those freedoms which were previously guaranteed. We can expect that we will have to continually work to protect and expand our freedoms.

We can predict how our ideas will be received. Because those who work and teach in the area of family law occupy a lower status within the legal profession, we cannot assume that we will have credibility. Like jazz pioneers, we can expect critiques that may be open and stinging, and that may be retracted later.

But we can also use our status as outsiders as an edge. African American musicians, many of them outsiders to European musical training, have been the builders of jazz. Being outside an acknowledged tradition can mean being outside of those restrictions on that tradition as well. Outsiders built a new musical culture, and similarly, outsiders can build family law in ways that move beyond previous limitations. For example, Professor Melanie Jacobs suggests

that our legal construction of paternity may be too restrictive.[144] She argues that in some cases, children may benefit from having a legal relationship with both their biological fathers and the stepfathers who want to adopt them.[145] This is an extraordinarily creative idea. It is one that would work for many families, but would not be easily accepted in most county courthouses.

Jazz is musical freedom—freedom to change, grow, and communicate. These freedoms have threatened the musical establishment, but each new development has added to our musical culture. Family law struggles to achieve the freedom found in jazz. Changes from restrictive, central control to individualism are met with resistance, but ultimately those freedoms allow us to be who we are and contribute to the development of our law and culture.

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144. Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 813 (2006).

145. *Id.* at 851-52.

FAMILY LAW FOR THE UNDERCLASS: UNDERSCORING LAW'S IDEOLOGICAL FUNCTION

DAVID RAY PAPKE*

It is challenging to discuss the relationship of socioeconomic class to family law and to the law in general. Against the backdrop of a dominant culture that valorizes individualism, traditional American legal thought has routinely assumed significant degrees of choice and volition and called for laws and legal processes able to accommodate free-willed decisionmaking. "[I]f there is a single leitmotif of modern law, whether civil rights law, commercial law, family law, or the law of landlord and tenant," the legal historian Lawrence Friedman observed, "it is an extreme emphasis on the *individual*, and on individual choice or consent; the whole system turns on this point."[1] In the contemporary legal academy, those interdisciplinary and theoretical approaches most receptive to presumptions of individual choice, for example, "law and economics," have been more likely to thrive than approaches that rely on class or even gender.[2] Champions of "law and economics" enthusiastically contemplate the workings of markets, both real and imaginary, often formulaically conjuring up the image of individual maximizers of self-interest.

In scholarship speaking of socioeconomic class, by contrast, the individual ceases to be the leitmotif and questions of the individual's self-maximizing choices leave center-stage. Differences among individuals are of course recognized, but the focal point for commentary and analysis is more social and collective. The underlying assumption is that class affiliation strongly affects one's choices in life and also one's interaction with the law and legal processes.

Surely that is the case for members of the underclass. In the contemporary United States, 10-12% of the adult population belongs to a sub-working class.[3] This underclass is disproportionately African American, but it also includes Latinos, Native Americans, and Caucasians. The Caucasian members of the underclass, Christopher Jencks reminds us, can be easily overlooked.[4] Caucasian

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1. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1585 (1989).

2. In launching a new law and humanities journal, a miffed Owen Fiss noted that law and economics had become "*the* interdisciplinary method for studying law." Owen M. Fiss, *The Challenge Ahead*, 1 YALE J.L. & HUMAN., at viii, ix (1988-89).

3. The Eisenhower Foundation estimated in 2008 that 37 million Americans lived in poverty and the proportion of the poor below half the poverty line had grown from 30% in 1975 to 43% in 2006. The child poverty rate increased from 15% in 1968 to 17% in 2006. EISENHOWER FOUND., WHAT TOGETHER WE CAN DO: A FORTY YEAR UPDATE OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 3 (2008), *available at* http://www.eisenhowerfoundation.org/kerner.php.

4. *See* CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE

members of the underclass make up only a small percentage of the whole Caucasian population and infrequently constitute a majority in a residential neighborhood, but non-Caucasian members of the underclass make up substantial percentages of minority populations and more frequently constitute majorities in given neighborhoods.[5] Regardless of race and ethnicity, members of the underclass receive or have received welfare in the past. They lack regular employment or have dropped completely out of the labor market. Underclass Americans frequently lead lives of semi-permanent poverty and debilitating transience, and if they experience any degree of "upward mobility," it is commonly to only the lower rungs of the working class.[6]

After an initial section outlining in more detail my understanding of class, the underclass, and ideology, this Article focuses on the relationship of the underclass and family law. The second section explores the underclass's relationship to marriage law, emphasizing programs to get the underclass to marry. The third section addresses issues of child support, critically examining the range of state and federal laws designed to extract support from delinquent payors, a large percentage of whom belong to the underclass. The final section of the Article turns to adoption, and it highlights the role of underclass women as "suppliers" in adoption and the ways legal standards and procedures strongly favor adoptive parents over biological ones.

Family law in these areas functions more or less successfully to support social institutions thought to be desirable, to enforce individual obligations and responsibilities, and to foster the well-being of children. However, family law for the underclass additionally assumes a distinctly ideological function. In particular, it condemns the underclass. This ideological stance is evident in selected family law statutes and appellate opinions, and it also emerges in the policy thinking and political preferences that buoy the statutes and opinions. Family law as ideology also intersects with other varieties of ideology in the form of religious sermons, political rhetoric, and even popular culture such as movies and television programming. The ideology suggests the underclass does not comport itself with the norms of the middle and upper classes and, therefore, lives its collective life improperly.

I. AN INTRODUCTION TO CLASS ANALYSIS AND THE NOTION OF AN "UNDERCLASS"

Even a casual observer would recognize that a class analysis has traditionally been suspect in American legal and political discourse. The chief reason for the suspicion is the linkage of class analysis to Marxism and to Communism.

UNDERCLASS 145 (1992).

5. *See id.*

6. *See* Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 879, 900-01 (2007) ("Recent studies show that the United States has one of the lowest rates of upward mobility in the developed world and that few citizens leave the class into which they are born for a higher one.").

Indeed, Karl Marx and his collaborator Friedrich Engels claimed in the *Communist Manifesto* that "The history of all hitherto existing society is the history of class struggles."[7] Marx and Engels also asserted that class was a uniquely prominent feature of any capitalist society.[8] They did not have the United States primarily in mind, but if Marx and Engels were alive today, they would recognize the United States as the world's leading capitalist country and presumably be inclined to underscore its immense class-based inequalities.

However, there is no reason that a law-related class analysis need be Marxian. Other social theorists and sociologists have discussed and critiqued socioeconomic class for almost two centuries, and many have not divided modern society into two great classes—the proletariat and the bourgeoisie—as Marx did. Different societies and different epochs have different class structures. In the contemporary United States, the white-collar middle class is larger than the traditional blue-collar class of manual workers, and scholars have even suggested that the burgeoning middle class is the key to the American economy.[9] "[I]t is misleading in itself to treat white-collar labor as an undifferentiated category, and the overall expansion of the white-collar sector in capitalist societies conceals differential rates of growth in various occupational subcategories."[10] Furthermore, middle-class subcategories are themselves hierarchically arranged. One might rank the major subcategories of the white-collar middle class in order as follows: professional and managerial workers, small businessmen, technical and support workers, and clericals. Clericals have experienced a relative loss of income and status within the white-collar middle class, and some clericals now have less job security than members of the ever-shrinking blue-collar working class.[11]

Class structures are not only variable among societies and across time but are also permeable and shifting. Depending on the nature and rigidity of the class structure, some number of individuals might move from one class to another. Often these individuals are temporarily accommodated by intermediate and transitional strata, for example, upwardly mobile student populations. In some cases whole occupations assume new locations in the overall class structure. Secretaries, for example, had higher social standing a century ago than they do today.[12] Class systems are dynamic, both for individuals and groups.

In general, a class in a capitalist society is a group of people with comparable

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7. KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 9 (1948).

8. *See* A DICTIONARY OF MARXIST THOUGHT 75 (Tom Bottomore ed., 2d ed. 1983).

9. *See* JOSEPH BENSMAN & ARTHUR J. VIDICH, THE NEW AMERICAN SOCIETY: THE REVOLUTION OF THE MIDDLE CLASS 15-16 (1971).

10. Anthony Giddens, *The Growth of the New Middle Class, in* THE NEW MIDDLE CLASSES: LIFE-STYLES, STATUS CLAIMS AND POLITICAL ORIENTATIONS 105 (Arthur J. Vidich ed., 1995).

11. *See id.* at 106.

12. The decline in status for secretaries occurred as men relinquished the occupation to women. *See* International Association of Administrative Professionals, *History of the Secretarial Profession*, http://www.iaap-hq.org/researchtrends/history.htm (last visited June 7, 2009).

assets, employment, and market relations.[13] Members of a class can anticipate similar overall societal standing and remuneration. One's class affiliation is an important factor in one's living conditions, life experiences, and economic opportunities.

Such opportunities are limited for members of the "underclass," a second stopping point in this introductory discussion. European social critics reaching back to Marx have commented on this social configuration,[14] but the notion of an underclass seems to have truly caught hold in the United States in the 1970s. In particular, American journalists began to write about the underclass. A featured article published in *Time* in 1977 included pictures of drug-users, defiant young men, pregnant teenagers, and children playing on dirty streets—virtually displaying the underclass as if it was in a museum or a zoo.[15] The article described the underclass's social environment as "a different world, a place of pock-marked streets, gutted tenements and broken hopes."[16] The underclass, the article continued, was "a large group of people who are more intractable, more socially alien and more hostile than almost anyone imagined."[17]

Similar articles continued to appear throughout the 1980s, and some fed into the inclination of conservative politicians to criticize inner-city Americans for their laziness and social pathology. In a 1987 *Fortune* article, *America's Underclass: What to Do?*, Myron Magnet argued underclass Americans were recognizable through "not so much their poverty or race as their behavior—the chronic lawlessness, drug use, out-of-wedlock births, nonwork, welfare dependency, and school failure."[18] "'Underclass' describes a state of mind and a way of life," Magnet asserted. "It is at least as much a cultural as an economic condition."[19] Magnet then employed a "law and economics" analysis:

> Economists have a vision of man as a rational calculator, scurrying

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13. In pointing to considerations in addition to the capital/wage-labor relation, my rough definition of class draws as much from Max Weber's theoretical writings as it does from Karl Marx's polemics. For a thoughtful comparison of Weber and Marx on the topic of "class," see Anthony Giddens, *Marx and Weber: Problems of Class Structure*, *in* SOCIAL CLASS AND STRATIFICATION: CLASSIC STATEMENTS AND THEORETICAL DEBATES 114-18 (Rhonda F. Levine ed., 1998) [hereinafter SOCIAL CLASS AND STRATIFICATION].

14. Marx referred briefly in his writings to a "lumpenproletariat," a group of vagabonds and petty criminals. *See, e.g.*, Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, *in* MARX & ENGELS: BASIC WRITINGS ON POLITICS AND PHILOSOPHY 320, 345-48 (Lewis S. Feuer ed., 1959) [hereinafter MARX & ENGELS]. In *Manifesto of the Communist Party*, Marx describes the lumpenproletariat as "social scum, that passively rotting mass thrown off by the lowest layers of old society." Karl Marx, *Manifesto of the Communist Party*, *in* MARX & ENGELS, *supra*, at 6, 18.

15. *The American Underclass—Destitute and Desperate in the Land of Plenty*, TIME, Aug. 29, 1977, at 14-27.

16. *Id.* at 14.

17. *Id.*

18. Myron Magnet, *America's Underclass: What to Do?*, FORTUNE, May 11, 1987, at 130.

19. *Id.*

> among available options maximizing gain, driven hither and yon by this incentive or that disincentive. This way of thinking, to be sure, has a real usefulness in grappling with the underclass problem. Where incentives for failure exist—welfare and the unwillingness to punish criminals are the luminous two cases in point—then of course the community has to change the calculus.[20]

Troubled by the increasingly hostile alignment of this journalism, prominent contemporary sociologist William Julius Wilson critiqued it sharply.[21] Wilson had earlier attempted to place the American underclass in historical context.[22] The American underclass, Wilson thought, was a relatively modern phenomenon that derived from post-World War II changes in the economy.[23] In essence, the labor market grew increasingly segmented, and access to good jobs and personal wealth came to depend on educational criteria.[24] Poorly trained and educated, the underclass constituted "the very bottom of the economic hierarchy and not only includes those lower-class workers whose income falls below the poverty level but also the more or less permanent welfare recipients, the long-term unemployed, and those who have dropped out of the labor market."[25]

Wilson has backed off the term "underclass" in his own scholarship, fearing that it is a convenient tool for those who want to speak of the sub-working class pejoratively and to condemn it for its misconduct.[26] Wilson's fears about the term are understandable, but the term is still useful, if only to denote a class worse off than the regularly employed working class.

Before abandoning the term "underclass," Wilson argued that the fundamental dilemma facing the underclass was "joblessness reinforced by an increasing social isolation in an impoverished neighborhood."[27] In other words, beyond merely lacking jobs and legitimate economic opportunities, members of the underclass, in Wilson's conceptualization, also lacked community safeguards and supports.[28] This is an extremely debilitating situation. Members of the underclass might with good reason experience frustration, boredom, and

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20. *Id.* at 140.

21. *See* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 171-82 (1996) [hereinafter WILSON, WHEN WORK DISAPPEARS].

22. *See* WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS, at xi (2d ed. 1980) [hereinafter WILSON, THE DECLINING SIGNIFICANCE OF RACE].

23. *Id.* at 92-93.

24. *Id.* at 94-95.

25. *Id.* at 156.

26. For a discussion of Wilson's disavowal of the term "underclass," see Bill E. Lawson, *Meditations on Integration*, *in* THE UNDERCLASS QUESTION 6 (Bill E. Lawson ed., 1992).

27. William Julius Wilson, *The Underclass: Issues, Perspectives, and Public Policy*, *in* THE GHETTO UNDERCLASS: SOCIAL SCIENCE PERSPECTIVES 20 (William Julius Wilson ed., 1993) [hereinafter Wilson, *The Underclass*].

28. *See id.*

alienation. Additionally, members of the underclass may manifest criminal behavior and other social pathologies.

From the perspective of the superior working, middle, and upper classes, the ongoing presence of an underclass is an intractable problem. In a Marxian understanding of class relations, there is an "*antagonistic interdependence of material interests* of actors within economic relations."[29] More specifically, the material welfare of the more powerful classes depends on the material deprivations of the less powerful classes.[30] The dominant classes appropriate the fruits of the labor of the exploited.[31] "This dependency of the exploiter on the exploited gives the exploited a certain [form] of power, since human beings always retain at least some minimal control over their own expenditure of effort."[32] Exploiters would like the exploited to cooperate, and in order to obtain that cooperation, exploiters sometimes moderate their demands. "Paradoxically perhaps, exploitation is thus a constraining force on the practices of the exploiter. This constraint constitutes a basis of power for the exploited."[33]

How does one exploit an isolated, debilitated underclass? Members of the underclass do not necessarily sell their labor in sustained ways for crucial purposes, and, as a result, the fruits of their labor cannot be appropriated.[34] "The situation is similar to a capitalist owning outmoded machines. While the capitalist physically controls these pieces of machinery, they cease to be 'capital'—a capitalistically productive asset—if they cannot be deployed within a capitalist production process profitably."[35] Members of the more powerful classes do not for the most part become angry with their outmoded machinery, but they do sometimes grow irritated with the underclass:

> The material interests of the wealthy and privileged segments of American society would be better served if these people simply disappeared. However, unlike in the nineteenth century, the moral and political forces are such that direct genocide is no longer a viable strategy. The alternative, then, is to build prisons and to cordon off the zones of cities in which the underclass lives.[36]

Short of incarceration and residential segregation, the middle and upper classes can exercise some degree of control over the underclass through its rhetoric. If the underclass cannot truly be changed, at least its members can be criticized, deplored, and set clearly outside the mainstream. Pronouncements of this sort are ideological, "ideology" standing not for falsehood but rather the

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29. Erik Olin Wright, *Class Analysis*, *in* SOCIAL CLASS AND STRATIFICATION, *supra* note 13, at 141.

30. *Id.*

31. *Id.* at 142.

32. *Id.* at 143.

33. *Id.*

34. *See id.* at 153.

35. *Id.* at 152-53.

36. *Id.* at 153.

normative ideas and attitudes of a given social group or coalition of groups.[37] "Ideologues" who would denigrate the underclass could speak not only through conventional political speeches and writings but also through law, religion, philosophy, and even aesthetics.[38] In the contemporary setting, as a later section of this Article will illustrate, popular culture in the form of movies and television programming also sometimes ridicules and condemns the underclass.

Often, the underclass is in a poor position to complain. Modern-day American "welfare reform" glorifies wage relations in a market economy, but members of the underclass, lacking strong wage relations, cannot for the most part effectively complain to employers. In the political arena, members of the underclass are severely alienated and often do not make their way to the polls. This reduces their leverage with politicians and elected officials. Overall, a striking degree of economic and political powerlessness is evident within the underclass, and the underclass is a sector of society especially vulnerable to the buffeting of ideology.

II. MARRIAGE LAW

Although annulments, ante-nuptial agreements, and the possibility of same-sex unions are important for members of the middle and upper classes, these mainstream marriage law concerns have appreciably less urgency for the underclass. The chief reason is that members of the underclass do not seek to marry or actually marry as frequently as members of the middle and upper classes.[39] During most of the twentieth century Americans of all classes married at roughly the same rate,[40] but the incidence of decline of underclass marriage began to manifest in the 1970s.[41] By the end of the 1980s, poor women were only three-quarters as likely to marry as middle and upper-class women.[42] In the two decades since, the contrast has grown even more striking, and as of 2005 poor men and women were only one-half as likely to marry as men and women with incomes at least three times the poverty level.[43] Variations exist according to region, ethnicity, and race, but "[t]he emerging gulf is instead one of class—what demographers, sociologists, and those who study the often depressing statistics about the wedded state call a 'marriage gap' between the well-off and the less so."[44] Law as a social instrument *and* as a refined

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37. *See* RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 53-57 (2d ed. 1983).

38. *See id.* at 54.

39. *See* Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 THE FUTURE OF CHILDREN, Fall 2005, at 117, 118.

40. *See id.*

41. Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 FAM. L.Q. 567, 570-71 (2007).

42. *Id.* at 571.

43. *See* Edin & Reed, *supra* note 39, at 118.

44. *See* Kate Zernike, *Why Are There So Many Single Americans?*, N.Y. TIMES, Jan. 21,

ideological pronouncement would like to narrow the gap.

Why are members of the contemporary underclass less likely to marry? Some religious, pro-family groups point to the underclass's lack of respect for the sacred institution of marriage and to the underclass's general moral disarray, but scholars point to less normative and more substantive factors. As early as 1981, for example, the scholar Gary S. Becker argued forcefully that with women's entry into the labor force and rise in income relative to men's income, women no longer needed to marry and could remain single if they wished.[45] Underclass women, in particular, are more likely to be employed than underclass men, and even their border-line financial independence makes it more likely that they will live their lives without husbands.[46] William Julius Wilson, by contrast, pointed primarily to the declining number of "marriageable" men in the inner-city.[47] He argues that "the sharp increase in black male joblessness since 1970 accounts in large measure for the rise in the rate of single-parent families, and that because jobless rates are highest in the inner-city ghetto, rates of single parenthood are also highest there."[48] Wilson's theory is that, against the backdrop of deindustrialization, inner-city men have declining or non-existent wages, and inner-city women have less interest in drawing from the pool of potential husbands.[49] Kathryn Edin and Maria Kefalas add that a culture-wide redefinition of marriage has occurred since the 1950s.[50] The standards for marriage have risen, and sex and childbearing have been decoupled from marriage.[51] Members of the underclass share these new attitudes with members of the middle and upper classes, but the difference is that members of the underclass are less likely to reach what Edin and Kefalas call the "white picket fence dream."[52]

Edin also participated in a particularly thoughtful recent study of the underclass's low marriage rates with Christina M. Gibson-Davis and Sara McLanahan.[53] These scholars began with data from the *Fragile Families and Child Well-being Study*, a nationally representative study of 3700 unmarried

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2007, at 4-1.

45. *See* GARY S. BECKER, A TREATISE ON THE FAMILY 14-37 (1981). For a challenge to Becker's thesis, see generally Valerie Kincade Oppenheimer, *Women's Rising Employment and the Future of the Family in Industrial Societies*, 20 POPULATION & DEV. REV. 293 (1994).

46. *See* Bureau of Labor Statistics, Economic Situation Summary, http://www.bls.gov/news.release/empsit.nr0.htm (last visited June 7, 2009).

47. WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 91 (1987) [hereinafter WILSON, THE TRULY DISADVANTAGED].

48. WILSON, WHEN WORK DISAPPEARS, *supra* note 21, at 94-95.

49. *See* WILSON, THE TRULY DISADVANTAGED, *supra* note 47, at 91.

50. KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 201 (2005).

51. *See id.*

52. *Id.* at 202.

53. Christina M. Gibson-Davis, Kathryn Edin & Sara McLanahan, *High Hopes but Even Higher Expectations: The Retreat from Marriage Among Low-Income Couples*, 67 J. MARRIAGE & FAM. 1301 (2005).

couples with newborns and a comparison sample of 1200 married couples with newborns.[54] They then extended the data with their *Time, Love, Cash, Caring and Children Study*, an embedded, qualitative, interview-based study of forty-nine "fragile families" and twenty-six married couples.[55] The "fragile family" sample was limited to English-speaking parents whose household incomes were less that $30,000 or who used Medicaid to pay for the birth of their children.[56] The core sample, in other words, consisted largely of unmarried underclass men and women who had recently become parents.

Gibson-Davis, Edin, and McLanahan concluded that financial stability was by far the most common barrier to marriage.[57] The overwhelming number of interviewees said they wanted to get their finances in order before getting married.[58] This included the ability to regularly make ends meet, the acquisition of suitable semi-permanent assets, the development of prudent asset-management skills, and the accumulation of enough savings to have a proper wedding.[59] The latter goal, although not necessarily the key financial concern, intriguingly suggests that while members of the underclass may not marry as frequently as members of the more prosperous classes, members of the underclass *do* believe in marriage and consider it an important and desirable undertaking. Members of the underclass could modestly and inexpensively marry before magistrates and justices of the peace, but most want something fancier and more expensive.[60] "Though these expectations may seem impractical," Gibson-Davis, Edin, and McLanahan say, "we believe that they reflect the idea among low-income parents that getting married should signal that the couple has 'arrived' in a financial sense."[61]

Underclass couples also cited the quality of relationships and the undesirability of divorce as barriers of sorts to marriage.[62] Unmarried couples frequently say they want to know more about one another and whether their relationship is strong enough before committing to marriage.[63] The articulation of terms for marriage dissolution in an ante-nuptial agreement is not an issue because most underclass couples do not think marriage should be a short-term matter.[64] In a related vein, many members of the underclass believe that "divorce ought not to be an option."[65] Jokes about "starter marriages" do not play as well with unmarried underclass couples as they do with members of the middle and

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54. *Id.* at 1301.
55. *Id.*
56. *Id.* at 1304.
57. *Id.* at 1307.
58. *Id.*
59. *Id.* at 1307-08.
60. *Id.* at 1308.
61. *Id.*
62. *Id.* at 1307.
63. *Id.* at 1308-09.
64. *See id.* at 1309.
65. *Id.*

upper classes.

This is not to say that law related to marriage has no relevance to members of the underclass. Annulments, ante-nuptial agreements, and the substantive and procedural laws of marriage are of lesser importance to the underclass, but members of the underclass might be aware of the marriage promotion laws that have been enacted in recent years. The religious and fiscal conservatives who run the programs established under these laws frequently target the underclass. The marriage promotion programs are examples of family law attempting to perform a "channeling function," that is, directing people toward preferred relationships and institutions.[66]

The promotion of marriage by governmental officials began in a sense with the complaints and pronouncements of then Vice President Dan Quayle in 1992.[67] In a speech to the Commonwealth Club of California, Quayle surprisingly cited unwed motherhood as a contributing factor to the riots that occurred in Los Angeles earlier in the year.[68] More surprisingly, he even criticized the sit-com character Murphy Brown, a fictional news anchorwoman played by actress Candace Bergen.[69] Brown wanted to have a baby but also remain single. Quayle complained: "It doesn't help matters when prime time TV has Murphy Brown—a character who supposedly epitomizes today's intelligent, highly paid, professional woman—mocking the importance of fathers, by bearing a child alone and calling it just another 'lifestyle choice.'"[70] Instead of delivering messages of this sort, Quayle thought, we should be promoting marriage and teaching Americans how to sustain their marriages.

The liberal media ridiculed Quayle for picking a fight with a fictional character,[71] and he and his running mate George H. Bush lost their bid for reelection. Nevertheless, marriage promotion remained available as something to champion for politicians of many stripes. In the mid-1990s, for example, Congress approved and President William Clinton signed into law massive changes in the welfare system.[72] A later section of this Article discusses this welfare reform at greater length, but relevant at this point are the ways governmental leaders linked welfare reform to marriage. The welfare reform statute itself begins with ten congressional findings, and the first two concern marriage. The statute tells us directly that "[m]arriage is the foundation of a

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66. Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992).

67. *See* Vice President Dan Quayle, Address to the Commonwealth Club of California (May 19, 1992) (transcript *available at* https://www.commonwealthclub.org/archive/20thcentury/92-05quayle-speech.html).

68. *Id.*

69. *See* Sophronia Scott Gregory, *Dan Quayle v. Murphy Brown, the Vice President Takes on a TV Character over "Family Values,"* TIME, June 1, 1992, at 20; Quayle, *supra* note 67.

70. *See* Quayle, *supra* note 67.

71. Who Hijacked Our Country, http://whohijackedourcountry.blogspot.com/2008_09_01_archive.html (Sept. 2, 2008, 12:14 a.m.).

72. *See* 42 U.S.C. §§ 601-616 (2006).

successful society"[73] and also that "[m]arriage is an essential institution of a successful society which promotes the interests of children."[74] This endorsement of marriage had obvious appeal for members of pro-family and religious groups battling in the curious trenches of the culture wars.[75]

When George W. Bush moved into the White House in 2001, marriage promotion became one of the ways he could project his preferred image as a "compassionate conservative."[76] Referring back to the "findings" made in conjunction with welfare reform, the Bush Administration seized upon marriage promotion as the next stage of welfare.[77] Once people had been removed from welfare, the argument went, marriage could be a way for former welfare recipients to become productive members of society and to achieve financial security.

The Deficit Reduction Act of 2005 created "The Healthy Marriage Initiative" and made funding of $150 million available for each of the fiscal years 2006 through 2010 for marriage promotion programs and activities.[78] What from the Bush Administration's perspective was a "healthy marriage"? "There are at least two characteristics that all healthy marriages have in common. First, they are mutually enriching, and second, both spouses have a deep respect for each other."[79] "We don't want to come in with a heavy hand," said Dr. Wade F. Horn, Assistant Secretary of Health and Human Services for Children and Families.[80] "We want to help couples, especially low-income couples, manage conflict in healthy ways."[81]

The federal "Healthy Marriage Initiative" dovetailed with programs that preceded it in individual states, and it also led to new ventures. Oklahoma, for example, had mounted programs even before the federal initiative, and the so-called "Oklahoma Marriage Initiative" became the first statewide initiative.[82] It

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73. H.R. 3734, 104th Cong. § 101(1) (enacted).

74. *Id.* § 101(2).

75. "Many saw (and still do see) welfare reform as part of a moral crusade; a moral crusade against those evils of promiscuity, 'illegitimacy,' single mother-headed households, and so on." Barbara Ehrenreich, *TANF, or "Torture and Abuse of Needy Families" Top Ten Misconceptions About TANF*, 1 SEATTLE J. FOR SOC. JUST. 419, 423 (2002).

76. *See* Robert Pear & Daniel D. Kirkpatrick, *Bush Plans $1.5 Billion Drive for Promotion of Marriage*, N.Y. TIMES, Jan. 14, 2004, at A1.

77. *See* Monica Davey, *Promoting Marriage Becomes Major Phase of Welfare Reform*, INDIANAPOLIS STAR, Dec. 2, 2001, at A12.

78. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 104 Stat. 4 (2006) (codified as amended at 42 U.S.C. § 603(a)(2)(D) (2006)).

79. U.S. Dep't Health & Human Servs., The Healthy Marriage Initiative (HMI) General Information, http://www.acf.hhs.gov/healthymarriage/about/mission.html (last visited June 10, 2009).

80. Pear & Kirkpatrick, *supra* note 76.

81. *Id.*

82. *See* The Oklahoma Marriage Initiative, http://www.okmarriage.org/ (last visited May 7, 2009).

has used $10 million in federal monies to create a marriage resource center and to mount youth outreach campaigns, school-based programs, and community workshops.[83] Most marriage initiatives are local, but groups and individuals have also designed programs such as the Hispanic Healthy Marriage Initiative, the Native American Healthy Marriage Initiative, and the African American Healthy Marriage Initiative for members of minority groups regardless of their residence.[84] In hopes of promoting marriage among African Americans, the African American Marriage Initiative has recalled slaves' determination to marry even though antebellum law precluded it. In some areas, slaves unofficially married by jumping over a broom.[85] The modern-day African American Marriage Initiative distributes a "Jump the Broom" video as part of its marriage promotion program.[86]

Of particular interest for purposes of this Article are marriage promotion programs specifically designed for the underclass. Champions of marriage have realized that programs designed with white, middle-class, well-educated couples in mind might not work as well for members of the underclass.[87] Hence, a program such as "Loving Couples Loving Children" uses a television "talk show" format in which couples discuss their relationships in front of a lively audience.[88] Fortunately, the tone is closer to "Oprah" than to "Jerry Springer." "Love's Cradle," another marriage promotion program designed for the underclass self-consciously "dumbs down" the presentation. It pitches to a fifth-grade educational level,[89] apparently never stopping to realize how insulting it might be to even poorly educated people.

Anticipating criticism, proponents of marriage promotion denied any sinister motives or agendas. Wade F. Horn, for example, insisted that assorted marriage initiatives would not force anyone to get or stay married.[90] Indeed, it does not appear that marriage promotion programs have led many members of the underclass to marry, even though some of the programs have gone so far as to offer bonuses for those who marry.[91] "Very little research exists to show that

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83. *See* Teresa Kominos, Comment, *What Do Marriage and Welfare Reform Really Have in Common? A Look into TANF Marriage Promotion Programs*, 21 ST. JOHN'S J. LEGAL COMMENT. 915, 928-29 (2006-07).

84. For information regarding these healthy marriage initiatives as well as others, see U.S. Dep't Health & Human Servs., Healthy Marriage Initiatives, http://www.acf.hhs.gov/healthymarriage/index.html (last visited May 18, 2009).

85. *See* EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 475 (1976).

86. *See* African American Healthy Marriage Initiative, Jump the Broom, http://www.aahmi.net/files/jumpthebroom.html (last visited May 7, 2009).

87. *See* M. Robin Dion, *Healthy Marriage Programs: Learning What Works*, 15 THE FUTURE OF CHILDREN 139, 144 (Fall 2005).

88. *Id.* at 146.

89. *Id.*

90. *See* Pear & Kirkpatrick, *supra* note 76.

91. *See* Wendy Sigle-Rushton & Sara McLanahan, *For Richer or Poorer? Marriage as an*

marriage promotion programs are effective in creating marriages among low-income families."[92]

Family law, in other words, does not effectively "channel" members of the underclass into marriage.[93] Put differently, it does not effectively route the underclass to an institution the dominant classes take to be desirable.

In addition, as it applies to the underclass, marriage promotion embodies policy thinking that is naïve and borders on duplicitous. If members of the underclass would only marry, the thinking goes, they would be much more able to support themselves without government assistance. If the poor had two-parent households, they could in fact lift themselves out of poverty.

As Teresa Kominos bluntly stated with reference to this kind of thinking, "While marriage, in and of itself may be a desirable goal for many members of the community, it is not a solution to poverty . . . ."[94] Because Americans tend increasingly to marry within class,[95] we can assume that almost all members of the underclass who marry do marry other members of the underclass. The coupling of two impoverished people is unlikely to lift them from impoverishment. In the present economic setting, the possible husband is especially likely to be unemployed and, as a result, to be a "bread-eater" rather than a breadwinner.[96] Underclass women might also conclude that those underclass men with violent tendencies, criminal records, or children with other underclass women are lousy marital timber. One careful study used data from the *Fragile Families and Child Well-Being Study* to project the earnings and earning potential of unwed underclass parents if they were married; it concluded that much of the economic differential between married couples and unmarried parents can be attributed to factors other than marital status such as unemployment.[97] As a result, "[p]roponents of marriage are substantially overstating its benefits when they compare the earnings or poverty rates of single mother families to those of married, two-parent families."[98]

Anti-Poverty Strategy in the United States, 57 POPULATION 509, 512 (2002).

92. Julia M. Fisher, *Marriage Promotion Policies and the Working Poor: A Match Made in Heaven?*, 25 B.C. THIRD WORLD L.J. 475, 489 (2005) (reviewing DAVID SHIPLER, THE WORKING POOR (2004)).

93. *See* Schneider, *supra* note 66, at 498.

94. Kominos, *supra* note 83, at 947.

95. *See generally* Debra L. Blackwell & Daniel T. Lichter, *Mate Selection Among Married and Cohabitating Couples,* 21 J. FAM. ISSUES 275 (2000) (concluding that married couples are highly homogamous with respect to race and education); Christine R. Schwartz & Robert D. Mare, *Trends in Educational Associative Marriage from 1940 to 2003*, 42 DEMOGRAPHY 621 (2005) (showing that since the 1970s Americans were increasingly likely to marry those with similar educations).

96. *See supra* note 46. According to Barbara Ehrenreich, the idea that we could eliminate poverty with marriage "would not be such a bad idea if we had a lot of CEOs who were willing to marry women in poverty." Ehrenreich, *supra* note 75, at 419.

97. *See* Sigle-Rushton & McLanahan, *supra* note 91, at 523.

98. *Id.*

If marriage promotion laws do not "channel" underclass men and women into marriage, should we disregard these laws? If the policy thinking that buoys these laws is demonstrably faulty, might we simply ignore the laws? In general, such dismissive steps would be mistaken because, despite its ineffectiveness and superficiality, marriage promotion performs an important ideological function.

Indeed, if considered in the bright light of day, this ideological function of marriage law for the underclass might be neither a residual nor default function, but rather the most important function. Built on bourgeois assumptions, the marriage promotion programs are most certainly normative. Marriage promotion programs implicitly, and sometimes explicitly, deplore the poor for their lifestyles. The underclass and especially underclass women, this variety of family law suggests, can make the moral and intelligent choice to marry. If they do not make such a choice, they are living in an inappropriate way and are, in effect, responsible for their own poverty. Upstanding Americans need not approve of this easily avoidable, self-imposed poverty, and surely the state should not have to provide financial support.

III. CHILD SUPPORT

The faithful and timely payment of child support is potentially as important to members of the underclass as it is to members of the middle and upper classes. Child support obligations within the underclass, however, are much less likely to be part of complicated divorce negotiations and arrangements. To be sure, members of the underclass divorce in large numbers.[99] "Today, first marriages are more likely to disrupt in communities with higher male unemployment, lower median family income, higher poverty and higher receipt of welfare."[100] "The divorce rate among those who live below the poverty line is just about double that of the general population."[101] However, the lack of income and assets makes it unlikely that divorce negotiations will occur, and the majority of underclass divorces are pro se proceedings that resemble administrative processing.

Furthermore, as suggested in the prior section of this Article, large numbers of underclass Americans do not marry in the first place, and their children are not born or raised in the context of marriage.[102] As a result, child support calculations and payments do not take place against the backdrop of divorce. Mothers have custody of almost all underclass children born out of wedlock, and perhaps even more so than divorced custodial parents, a never-married mother would welcome the faithful payment of child support by her child's father.

But alas, non-custodial parents have hardly distinguished themselves as reliable payors of child support. According to United States Census Bureau

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99. Kathleen Mullan Harris, *Family Structure, Poverty and Family Well-Being: An Overview of Panel 2*, 10 EMP. RTS. & EMP. POL'Y J. 45, 57 (2006).

100. *Id.* at 45.

101. *Id.* at 57.

102. EDIN & KEFALAS, *supra* note 50, at 2 ("Having a child while single is three times as common for the poor as for the affluent."); *see also supra* notes 42-43 and accompanying text.

figures for calendar year 2005, only 46.9% of those legally and officially entitled to child support payments received all of those payments,[103] and 22.8% received no payments at all.[104] Not surprisingly, census figures do not reference an "underclass," but the figures do indicate that the parts of the population with characteristics typical of the underclass are the least likely to receive formally ordered child support. The percentage of never-married parents receiving no payments stood at 25.1% and was higher than the percentage of all custodial parents not receiving any payments.[105] A striking 28.8% of custodial parents without high school diplomas received no payments.[106] Most tellingly, 27.4% of those custodial parents with family income below the poverty line received no payments, and an additional 33% received only partial and/or irregular payments.[107] Lawmakers have been inclined to address delinquency problems and, at minimum, to ideologically deplore underclass non-payors.

For decades, state welfare systems have stumbled along trying to address the child support delinquency problem. In all states, delinquent payors can be prosecuted for failure to pay child support or, in extreme cases, for desertion of their children. All states also have enacted some form of the Uniform Reciprocal Enforcement of Support Act, known colloquially as "The Runaway Papa Act."[108] That law provides a process to thwart payors who flee to another state in hopes of avoiding child support.[109] States also have a range of measures at their disposal for establishing paternity, locating fugitive payors, and enforcing child support orders through civil actions for attachment and garnishment.[110]

These traditional options and processes notwithstanding, during the 1980s the pursuit of delinquent payors acquired a new animus. The notion of a "deadbeat dad" took hold with pejorative connotations even greater than those attached to the "welfare mom."[111] Sporting an alliterative lilt, the phrase "deadbeat dad" suggested indolent, shiftless, and duplicitous men who probably should not have fathered children in the first place. State and local governments began distributing lists and photos of the "Ten Worst Deadbeats," and law enforcement officials attempted to develop a national "most wanted deadbeats

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103. Timothy S. Grall, *Custodial Mothers and Fathers and Their Child Support: 2005*, CURRENT POPULATION REP. 2 (2007), *available at* http://www.census.gov/prod/2007pubs/p60-234.pdf.

104. *Id.*

105. *Id.* at 6.

106. *Id.*

107. *Id.* at 7.

108. *See* Catherine Wimberly, Note, *Deadbeat Dads, Welfare Moms, and Uncle Sam: How the Child Support Recovery Act Punishes Single-Mother Families*, 53 STAN. L. REV. 729, 735 (2000).

109. *Id.*

110. *See* Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 261-62 (2000).

111. *See id.* at 263-64.

list."[112] Police departments and prosecutors' offices conducted pre-dawn raids and round-ups and in some cases led delinquent payors away in handcuffs while television crews captured the moment.[113] Bounty hunters paid with federal money set out after delinquent payors on the run.[114]

In the courts, prosecutors and judges became more inclined toward punitive treatment of delinquent payors. One observer argued that the willingness of judges to jail delinquent payors made payment strikingly more likely.[115] Judges in Genesee County, Michigan, proved especially eager to jail delinquent payors, and their eagerness allegedly resulted in very high rates of payment.[116] Judge Fred Hazelwood in Manitowoc County, Wisconsin, took an even more noteworthy step.[117] He ordered a "deadbeat dad" *not* to have any more children until he could demonstrate he was supporting the nine children he already had.[118] The majority of justices on the Wisconsin Supreme Court signed off on Hazelwood's order.[119]

Although an occasional physician or architect might serve as a convenient poster child for the "deadbeat" dad population, it is difficult not to see the campaigns against delinquent payors as part of the condemnation of the welfare system that became increasingly audible during the 1980s. Delinquent and irresponsible payors, the argument went, were agents of poverty. They actually impoverished their children and the mothers of their children and forced these mothers and children to turn to the state for support. What about the many underclass fathers who themselves were born into poverty and are still living in poverty? The building outrage about "deadbeat dads" obscured that reality.

One ambitious ideologue who latched onto the notion that "deadbeat dads" were causing poverty was Joseph Lieberman, then Attorney General of Connecticut. He hurried into print a screed on the need to collect delinquent child support and the ways to do it.[120] Lieberman asserted that "the failure of delinquent fathers to pay child support is the major reason why more than half the American families that are headed by a woman live below the poverty level."[121] One chapter in his book discussed "the legal weapons available to

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112. *See* Sandra Evans, *Putting a Face on Deadbeat Dads*, WASH. POST, May 29, 1991, at D1.

113. *See* Paul Taylor, *Delinquent Dads; When Child Support Lags, 'Deadbeats' May Go to Jail*, WASH. POST, Dec. 16, 1990, at A1.

114. *See* Sarah E. Button, *Bounties on Deadbeat Dads*, MONEY, Mar. 1984, at 202.

115. DAVID L. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 118-19 (1979).

116. *Id.*

117. *See* David Ray Papke, State v. Oakley, *Deadbeat Dads, and American Poverty*, 26 W. NEW. ENG. L. REV. 9, 15 (2004).

118. *Id.*

119. *See* State v. Oakley, 629 N.W.2d 200, 203 (Wis. 2001). A symposium regarding the case appears at 26 W. NEW ENG. L. REV. 1 (2004).

120. JOSEPH I. LIEBERMAN, CHILD SUPPORT IN AMERICA: PRACTICAL ADVICE FOR NEGOTIATING—AND COLLECTING—A FAIR SETTLEMENT (1986).

121. *Id.* at x.

mothers."[122] Lest he seem too warlike, Lieberman also invoked the loving memory of his father Henry Lieberman: "It is altogether fitting that this book about what can be done to force delinquent fathers to support their children be dedicated to a man who was the embodiment of what a responsible father should be."[123]

Judge Hazelwood, Lieberman, and others were state and local officials, but national figures also spouted ideological pronouncements casting underclass fathers as disreputable agents of poverty. These figures included Republican Presidents Ronald Reagan, George H.W. Bush, and George W. Bush as well as Democratic President William Clinton. The latter promised to "end welfare as we know it,"[124] and he did in fact replace the Aid to Families with Dependent Children (AFDC) entitlement with the Temporary Assistance for Needy Families (TANF) program. When President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) into law in 1996, he explicitly linked welfare reform and child support together.[125] "For a lot of women and children," Clinton said, "the only reason they're on welfare today—the only reason—is that the father up and walked away when he could have made a contribution to the welfare of the children."[126]

The magnitude and range of federal child support legislation enacted since the mid-1980s are striking, especially because family law has traditionally been a state concern rather than a federal matter.[127] In 1984, Congress enacted a new round of amendments to Title IV-D of the Social Security Act.[128] Designed to get delinquents to pay up, the amendments directed states to enhance efforts to collect child support by making available employer withholding, liens against property, and deductions from tax refunds.[129]

In 1992, the federal government took even bolder steps to address the problem of unpaid child support. Political leaders on both sides of the

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122. *Id.* at 77.

123. *Id.* at v.

124. Presidential candidate William Clinton used this line during his 1992 campaign and also included it in his first State of the Union Address. *See* Delgado, *supra* note 6, at 908; Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523, 2548 (1995) (outlining liberal and conservative approaches to welfare for children and suggesting a "child support assurance" program). Clinton's call for the poor to get to work drew robust bipartisan support. *See* Delgado, *supra* note 6, at 908.

125. *See* Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, 2 PUB. PAPERS 1325, 1326 (Aug. 22, 1996).

126. *Id.*

127. *See* Laura W. Morgan, *The Federalization of Child Support; A Shift in the Ruling Paradigm: Child Support as Outside the Contours of "Family Law,"* 16 J. AM. ACAD. MATRIMONY LAW. 195, 195 (1999).

128. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended at 42 U.S.C. §§ 651-669 (2006)).

129. 42 U.S.C. § 666 (2006).

aisle—Republican Congressman Henry Hyde and Democratic Congressman Charles Schumer, for example—spearheaded the effort to enact the Child Support Recovery Act (CSRA).[130] The only opponents of the act were members of the nascent fathers' rights movement.[131] Some of them questioned the assumption that child support delinquency caused poverty and argued that most of the impoverished families headed by unmarried mothers would not be lifted out of poverty even if the delinquent fathers somehow paid their child support.[132] Having found a convenient whipping boy in the "deadbeat dad," Congress ignored the argument.

The CSRA itself authorized fines and imprisonment for non-custodial parents who owed child support in one state but lived in another.[133] However, prosecutions under the CSRA suggested the uselessness of the legislation with regard to obtaining child support from members of the underclass. Between October 1992 and February 1999, federal prosecutions resulted in only 105 convictions.[134] Most notably for purposes at hand, "none of the CSRA cases brought to trial involve debts owed to single-mother households where the family was 'poor' before the father left the household."[135] In other words, even though the CSRA could theoretically be used to address problems of delinquent child support in all walks of life, it was not. The great majority of convictions involved well-to-do fathers who were divorced from the mothers of their children and owed large amounts of child support.[136] Members of the underclass, most of whom had never married the mothers of their children and who had no substantial assets, never really became candidates for prosecution.

Congress might have taken note of the small number of prosecutions and the CSRA's obvious ineffectiveness as a poverty-reducing measure. Instead, Congress decided to stiffen the penalties for offenders who lived in one state and owed child support in another, and in 1998 President William Clinton signed into law the menacingly named Deadbeat Parents Punishment Act (DPPA).[137] It amended the CSRA, made offenses under the Act into felonies, and provided that certain offenders could be imprisoned for up to two years.[138] The DPPA also created the rather remarkable presumption, at least for members of the underclass, that a delinquent payor is able to pay child support.[139]

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130. Child Support Recovery Act of 1992, Pub. L. No. 105-521, 106 Stat. 3403 (codified as amended at 18 U.S.C. § 228 (2006)).

131. *See* Wimberly, *supra* note 108, at 739 (discussing the opposition of the Wisconsin Fathers for Equal Justice to the CSRA).

132. *Id.*

133. 18 U.S.C. § 228(c) (2006).

134. Wimberly, *supra* note 108, at 740.

135. *Id.* at 743.

136. *See id.*

137. Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (codified as amended at 18 U.S.C. § 228 (2006)).

138. *See* Wimberly, *supra* note 108, at 746.

139. 18 U.S.C. § 228(b) (2006).

In addition to criminalizing child support delinquency, the federal government addressed child support through PRWORA.[140] Mainstream commentaries have stressed the way the legislation replaced welfare entitlements with various state-designed "welfare-to-work" schemes.[141] Sometimes commentaries overlook PRWORA's mandate that states take measures to increase child support collection in order to qualify for federal block grants. The measures include, but are not limited to, in-hospital paternity determination, faster courtroom paternity proceedings, state-wide registration of delinquent payors, and the denial of licenses to drive, hunt, and engage in assorted occupations and professional practices.[142] According to one commentator, the new legislation was supposed to make the collection of child support "automatic and inescapable—'like death and taxes.'"[143]

Have the more aggressive child support collection measures enacted and undertaken since the mid-1980s made payors more faithful to their responsibilities? On the one hand, some progress has been made, and the lives of some custodial mothers and their children have been made easier. Law, in this sense, has functioned to bring some parents the payments to which, on behalf of their children, they are entitled. On the other hand, almost all of the success has been with middle and upper class families and not within the underclass.[144]

Lacking significant effectiveness among the poor, the "deadbeat dad" laws have only a negligible impact on poverty. According to Paul K. Legler, "By itself collecting child support is not a solution to the problem of poverty in single parent families. . . . If policymakers expect the changes in child support policy to substitute for cuts in welfare expenditures, they will have sorely missed the boat."[145]

None of this means that child support collection laws and processes have ceased to be "law" for the underclass. As was the case with the pro-marriage legislation and initiatives considered in the previous section of this Article, child support collection laws and processes rest on debatable assumptions and speak normatively. In the eyes of those comfortable Americans who promoted the new laws and processes, the poor not only fail to respect the institution of marriage but also fail to satisfactorily support their children. Those who support these aggressive child support laws honestly believe that the presumed failure of the underclass to support their children is wrong and un-American. Members of the underclass can be deplored and vilified even if we do not effectively police them. "Law," in this sense, is a bourgeois ideological construct.

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140. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

141. *See* Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 123 (2002).

142. *See* Brito, *supra* note 110, at 256-62.

143. *See* Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 538 (1996).

144. *See* Wimberly, *supra* note 108, at 743.

145. Legler, *supra* note 143, at 538.

IV. ADOPTION

Commentators on adoption often conceptualize the legal process as "triangular," that is, as involving three types of parties: biological parents, adoptive parents, and children.[146] However, there is an even more fundamental feature of adoption, one that is grounded in class. For the most part, "have-nots" relinquish children to "haves." In a majority of adoptions, the "have-nots" are members of the underclass, and children leave the homes of these biological parents to become children of their middle and upper-class adoptive parents. The class-related nature of the process is manifest for most domestic adoptions and also for the growing number of inter-country adoptions.[147]

This class imbalance helps explain why biological parents often experience and recall adoptions differently than do adoptive parents. For the latter, adoption is usually a wonderful development, and adoptive parents customarily feel proud and enriched. Underclass parents, by contrast, sometimes experience adoption in a daze, and they might recall the experience with regret and a great sense of loss. It is hard to believe, the underclass biological parent might reflect, but I was not financially stable enough to hold onto my own flesh and blood. Other underclass parents are more clear-headed when placing children for adoption, but they might feel guilty that they chose to place children for adoption in order to avoid exacerbating their poverty or becoming dependent on the children's fathers.[148] Adoption law as an ideological construct encourages underclass biological parents to think of themselves as failures.

The role of the underclass as the most important "supplier" of adoptable children became clear during the post-World War II decades, roughly the same time the modern underclass emerged. Between the end of the War and 1970, the number of American adoptions jumped more than threefold from approximately 50,000 to 175,000 annually.[149] Although in earlier eras the most sought-after adoptees might have been young adults who could perform work on family farms

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146. *See generally* BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION (2002) (discussing a study that finds adoption a success story for all three groups).

147. *See* Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 102 (1998) ("One troubling aspect of both transracial and international adoptions is that each often results in the transfer of children from the least advantaged women to the most advantaged.").

148. Maureen A. Sweeney, who as a college student placed a child for adoption, at first understood her decision in terms of her child's welfare but then realized self-interest played a role. "After time and reflection," she writes, "I believe within that genuine desire for my son was also a desire for myself. I knew that if I kept him I would probably marry his father (who had in the weeks before the birth become the one pushing for marriage), and my instincts were clamoring that this would be a disastrous move for me." Maureen A. Sweeney, *Between Sorrow and Happy Endings: A New Paradigm of Adoption*, 2 YALE J.L. & FEMINISM 329, 332 (1990).

149. *See* Kathy S. Stolley, *Statistics on Adoption in the United States*, *in* FAMILY LAW IN ACTION—A READER 105, 106 (Margaret F. Brinig et al. eds., 1999).

or in family businesses, infants and toddlers became the preferred adoptees during the adoption boom.[150] Adoptive parents were willing to expend substantial amounts for healthy youngsters.[151] Sociologist Vivian Zelizer calls this the "sentimentalization of adoption,"[152] and she speaks of the often poignant efforts of middle and upper-class Americans to find "the priceless child."[153]

As the demand for adoptees came to exceed the number of available children, earlier attempts to "match" the ethnicity or race of the child with the ethnicity or race of the adoptive parents fell by the wayside.[154] It no longer seemed like much of a problem if Norwegian-looking parents adopted a Greek-looking infant. It also became acceptable for Caucasians to adopt Native American and African American children. According to Elizabeth Bartholet, the Civil Rights Movement of the 1960s helped prompt transracial adoption by highlighting the plight of many minority children and by calling for integration.[155] "This movement's integrationist ideology made transracial adoption a sympathetic idea to many adoption workers and prospective parents."[156]

Some complained about transracial adoptions,[157] but adoption across race became more and more common as the twentieth century limped to a finish. This development was significant for the underclass because, as noted earlier, members of minority groups and especially African Americans constitute a large, disproportionate percentage of the underclass.[158] When commentators addressed adoption across race, they often unreflectively discussed the adoption of African American underclass children by members of the Caucasian middle and upper classes. Adopted children in most cases move from a poorer, less stable socioeconomic setting to a more prosperous and stable one. Some commentators

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150. A Minnesota study revealed that the average age of adoptees dropped from 24.61 months between 1900 to 1917 to 6.89 months between 1917 to 1927. *See* Alice M. Leahy, *A Study of Certain Selective Factors Influencing Prediction of the Mental State of Adopted Children*, 41 J. GENETIC PSYCH. 294, 300 (1932).

151. *See* VIVIAN A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 193 (1981).

152. *See id.* at 169-71.

153. *See id.* at 193.

154. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1178 (1991).

155. *See id.*

156. *Id.*

157. *See generally* James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487 (1987-88) (arguing that children best develop racial identity in same-race families); Asher D. Isaacs, *Interracial Adoption: Permanent Placement and Racial Identity—an Adoptee's Perspective*, 14 NAT'L BLACK L.J. 126 (1995) (discussing the national need to develop racial identity); Marlon N. Yarbrough, *Trans-Racial Adoption: The Genesis or Genocide of Minority Cultural Existence*, 15 S.U. L. REV. 353 (1988) (concluding that the use of race in adoptions should be encouraged).

158. *See supra* notes 3-6 and accompanying text.

use this very socioeconomic "cross-over" to counter those opposed to transracial adoption.[159] In Bartholet's condescending words, "We should not romanticize about what it is like to live on the social and economic margins of society."[160]

In general, legal institutions, standards, and processes greatly facilitated these adoptions. County welfare departments, non-profit agencies, and private attorneys are the chief coordinators of adoptions.[161] Adoptions coordinated by private attorneys have become the most rapidly growing variety of adoption.[162] When private adoption attorneys are in charge of managing and coordinating adoptions, middle and upper-class parents, the attorneys' clients, are most able to have their preferences accommodated.[163] County welfare departments and non-profit adoption agencies must balance demands from struggling biological families, state bureaucrats, and organized religious groups; their efforts are less clearly "client-driven."[164]

When attorneys file adoption petitions on behalf of their middle and upper-class clients with the appropriate court, the standard proceedings include obtaining consent from biological parents and a judicial consideration of whether the adoption is in the best interests of the child. With regard to both of these matters, those seeking to adopt have substantial advantages. The controlling approaches and standards help adoptions move forward to finalization. American law, in a sense, wants middle and upper-class Americans to be able to adopt the available children of the underclass.

The law's approach to consent from the biological parents is especially revealing. Consents from underclass biological mothers are obtained early and easily, and they are difficult to challenge at a later point in time even if the poor and poorly educated biological mothers consented hastily.[165] Courts usually require traditional varieties of fraud or duress before they are willing to invalidate a biological mother's consent.[166] Consent prompted by immaturity, financial desperation, or pressure from parents and lovers does not constitute fraud or duress.[167]

Consents from underclass biological fathers, meanwhile, can be exceedingly problematic. As noted in an earlier section of this Article, these fathers are in many cases not married to the mothers of the children placed for adoption.[168]

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159. *See* Bartholet, *supra* note 154, at 1207.

160. *Id.*

161. *See* David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459, 471-72 (1999).

162. *See* Susan A. Munson, *Independent Adoption: In Whose Best Interest?* 26 SETON HALL L. REV. 803, 811-16 (1996); Papke, *supra* note 161, at 471-72.

163. Papke, *supra* note 161, at 471.

164. *Id.*

165. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 936 (2d ed. 1988).

166. *See id.*

167. *See, e.g.*, *In re* J.M.P. 528 So. 2d 1002, 1009 (La. 1988).

168. *See supra* notes 41-43 and accompanying text.

Frequently, fathers do not live with the biological mothers of their children, and the whereabouts of some biological fathers are unknown. How might adoptive parents and their lawyers obtain consent from these men? States routinely authorize constructive notice to these fathers in legal publications with which the fathers could not possibly be familiar. Most states have also established so-called "putative fathers' registries."[169] Men who know or suspect they have fathered a child can place their names in the registries and then be notified if and when the child they think is theirs is placed for adoption. However, if a man fails to register, he waives his rights to notice, hearing, and consent.[170] Many underclass fathers, of course, lack the means, mobility, and confidence to register, and most are unaware of the registries.

The adoption finalization decree, couched with reference to "the best interests of the child," also favors the middle and upper-class adoptive parents over the underclass parents who relinquished or were forced to relinquish their children. "Best interests" in the context of adoption is not the same as "best interests" when two parents are battling for child custody at the time of divorce. In the latter, the judge might weigh the strengths and weaknesses of one parent against those of the other in hopes of placing the child in the most nurturing home. In the adoption context, by contrast, the judge is not really choosing between options. The biological parent or parents have placed the child for adoption, a caseworker has studied the files and the home of the adoptive parents, and a government department or non-profit agency has lent its support. The determination at this point in the process that the adoption is in "the best interests of the child" is, for all intents and purposes, a foregone conclusion. Underclass parents or, in most cases, unmarried underclass mothers could not hope to successfully argue that they should keep their children or that parents other than those who filed the adoption petition would be better picks.

How might one rationalize the frequent and routine adoption of underclass children by members of the middle and upper classes and the bias on behalf of the latter in the standard adoption proceeding? The indefatigable judge and "law and economics" scholar Richard Posner perceived the fundamental rules of the market economy asserting or at least attempting to assert themselves.[171] He urged that the market be even further cut loose to get babies whose parents were willing to place them for adoption into the hands of those most willing to adopt them.[172] Posner's proposals drew criticism,[173] and Posner, never shy about pimping for the

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169. *See generally* Diane S. Kaplan, *The Baby Richard Amendments and the Law of Unintended Consequences*, 22 CHILDREN'S LEGAL RTS. J., Winter 2002-2003, at 2 (discussing putative father registries); Donna L. Moore, *Implementing a National Putative Father Registry by Utilizing Existing Federal/State Collaborative Databases*, 36 J. MARSHALL L. REV. 1033 (2003) (advocating for a federal putative father registry).

170. Moore, *supra* note 169, at 1034.

171. *See* Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324 (1978).

172. *See id.*

173. *See* Tamar Frankel & Francis H. Miller, *The Inapplicability of Market Theory to*

well-to-do and the glories of the market economy, responded with one of his typically prickly retorts.[174]

While Posner's proposals failed to catch hold, a more copasetic rationalization for the adoption of underclass children by the middle and upper classes involved a deep-seated disrespect for underclass family life. As Gilbert A. Holmes pointed out, the process of American adoption incorporates a clear preference for the bourgeois nuclear family.[175] The law takes underclass families to be inferior, and "[u]nder nuclear family-based adoption policy, the law terminates the birth parents' rights before it engrafts parental rights in the adoptive parents."[176] When children then move to bourgeois nuclear families, the law assumes that this move must be good for the children.

To a large extent, these preferences grow out of a larger set of assumptions regarding parenting and especially mothering. Most members of the middle and upper classes hold dear a model of exclusive motherhood.[177] This intense style of mothering first appeared in Europe, and Freud critiqued it as early as the turn of the twentieth century.[178] Exclusive mothering and a related normative attitude regarding it reappeared in the United States in the 1950s and '60s,[179] and despite the many changes in women's condition since then, the model still has sway. Even though the majority of middle and upper-class mothers now work outside the home,[180] many mothers' sense of what is required for good mothering remains traditional. The proverbial "Super Mom" somehow finds a way to devote extraordinary amounts of time to her children.

In her now-classic feminist scholarship, Nancy Chodorow pointed out that the intense, exclusive style of mothering accepted by middle and upper-class Caucasians derives from "a socially and historically specific mother-child relationship."[181] For many members of the underclass, by contrast, financial necessities and subcultural norms lead parents to share child-rearing

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Adoptions, 67 B.U. L. REV. 99 (1987); J. Robert S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341 (1984); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

174. Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987).

175. *See* Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1674 (1995).

176. *Id.* at 1653.

177. *See* Melanie Nicholson, *Without Their Children: Rethinking Motherhood Among Transnational Migrant Women*, SOC. TEXT, Fall 2006, at 13, 15-16.

178. *See id.*

179. *See id.*

180. Approximately 75% of women between twenty-five and fifty-four either work outside the home or are actively seeking employment. *See* Eduardo Porter, *Women in Workplace—Trend Is Reversing*, S.F. CHRON., Mar. 2, 2006, at A2.

181. NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 76 (1978).

responsibilities with others, often within extended families.[182] This approach is most evident among African Americans, but it extends to underclass Hispanics, Native Americans, and Caucasians as well. Rayna Rapp studied mothering styles and family structures among the poor in American cities and found "there is a tremendous sharing of the children themselves."[183]

Those committed to exclusive mothering give the underclass community approach low scores. Some spokesmen for the dominant classes aggressively deplore the ways the underclass raises its children along with the lifestyles of the underclass in general.[184] Adopting underclass children could, as a result, seem an altruistic, even noble undertaking. Friends and relatives of adoptive parents often praise them for "saving" underclass children, and some adoptive parents proudly think of themselves as child-rescuers.[185]

Attitudes of this sort dwell not only within actual adoption processes and procedures but also in the culture as a whole. The cultural bias both prompts and reinforces the biases within the law regarding underclass parenting and the adoption of underclass children by middle and upper-class parents. This prompting and reinforcement are evident in a wide range of cultural expression.

Hollywood cinema, for example, should never be underestimated as an ideological organ. The cinema is, to quote from film theorist Robert B. Ray, "one of the most potent ideological tools ever constructed."[186] Films customarily speak in a highly normative way, and the failure or unwillingness of viewers to perceive this normativity only contributes to its power.[187] "Any stable society will be organised around a preferred self-image. . . . The function of this representation is to reproduce its own conditions of existence, in other words to protect the status quo."[188]

One example of a contemporary adoption film that incorporates a bias against underclass parenting and families is the much-praised and star-laden *Losing Isaiah*.[189] Scholars criticized the film for its negative portrayal of African American mothering,[190] but Khaila Richards, the film's biological mother, is as

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182. *See generally* ELMER P. MARTIN & JOANNE MITCHELL MARTIN, THE BLACK EXTENDED FAMILY (1978); DAVID M. SCHNEIDER & RAYMOND T. SMITH, CLASS DIFFERENCES IN AMERICAN KINSHIP (1978).

183. Rayna Rapp, *Family and Class in Contemporary America: Notes Toward an Understanding of Ideology*, *in* RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS 168, 177 (Barrie Thorne & Marilyn Yalom eds., 1985).

184. Twila L. Perry notes that "children transferred from devalued women to valued women are deemed to have received a lucky break." Perry, *supra* note 147, at 121.

185. *See id.*

186. ROBERT B. RAY, A CERTAIN TENDENCY OF THE HOLLYWOOD CINEMA, 1930-1980, at 55 (1985).

187. *See id.* at 54-55.

188. MIKE CORMACK, IDEOLOGY AND CINEMATOGRAPHY IN HOLLYWOOD, 1930-39, at 9 (1994).

189. LOSING ISAIAH (Paramount 1995).

190. *See* Perry, *supra* note 147, at 123-24.

much a member of the underclass as she is an African American. Here, as is often the case in the dominant culture, race serves as a convenient marker for socioeconomic class.

In the film, the Richards character, played by Halle Berry, conceived Isaiah during sex-for-drugs intercourse, but she is hardly prepared to be his mother. Young, addicted, and looking for more drugs, she leaves Isaiah on a trash can. Fortunately, sanitation workers find him and race him to a hospital. At the hospital, a social worker named Margaret Lewin, played by Jessica Lange, helps Isaiah through his crack-related difficulties, and then she and her husband Charles, played by David Straithairn, adopt him. But alas, a rehabilitated Richards appears wanting her son back. A series of wrenching personal exchanges among the characters follow, as do tortuous courtroom proceedings.

Through it all, viewers are invited to side with the Lewins and to reject both Richards's attempts to regain her son and Richards herself. We are horrified when the judge grants Richards custody. We flinch when Richards tries to get Isaiah to eat french fries, gives him a baseball cap he can wear backwards, and dumps him in daycare. And we understand when Isaiah pitches a fit and cries for his "Mommy," that is, Margaret Lewin. Toward the end of the film, Richards' frustrations drive her to the brink of child abuse, and we are immensely relieved when she turns to Margaret Lewin for help. It has been obvious to us at every turn that the bourgeois Lewin would certainly be a better parent than the underclass Richards.

Whenever middle or upper-class adoptive parents are available and willing, law, popular culture, and the dominant culture in general tell us these would-be parents should be allowed to adopt the children of the underclass. According to the dominant ideology, underclass children are poised on the junk heap of life. Their homes are unstable and perhaps unhealthy, and their biological parents do a lousy job of parenting. The children will have their best chance to thrive if they move from their scrambled, underclass families to stable, bourgeois families typical of the American mainstream.

CONCLUSION

Family law for the underclass is not sui generis. It performs many of the same functions family law performs for the middle and upper classes. It sometimes channels men and women into marriage. It sometimes helps parents obtain the child support to which their children are entitled. And it sometimes places children in loving, nurturing adoptive homes. Political leaders, legislators, and judges would in most cases be pleased by family law's ability to function in these ways, although these government officials might also acknowledge that family law's effectiveness with regard to these functions is limited, especially for the poor.

In addition, family law for the underclass assumes an ideological function. Buoyed by other ideological pronouncements in the form of political speeches, religious sermons, and mainstream popular culture, family law implicitly and, in some instances, explicitly censures the underclass for the way it lives its collective life. In particular, marriage promotion laws criticize the underclass for

its failure to marry and for its disrespect for the very institution of marriage. "Deadbeat dad" legislation deplores underclass fathers for failing to pay child support and for ignoring the resulting plight of their children and the mothers of those children. Adoption law rejects the way underclass parents raise their children and is prepared whenever possible to move those children into bourgeois adoptive homes. In all of these areas, family law for the underclass suggests underclass values and conduct—and not the denial of meaningful employment, educational opportunity, and residential mobility—deposit and keep the underclass in poverty.

The capacity of family law to function ideologically merits underscoring. Family law for the underclass plays a major role in designating members of the underclass as "outsiders" in the United States. Family law for the underclass suggests the underclass is a problem in and of itself rather than a sector of the population unjustly deprived of the material and social sustenance their society provides others. In performing this ideological function, family law for the underclass consigns impoverished Americans to their undesirable situation and, indeed, helps perpetuate the contemporary American class structure.

THE BASIS FOR LEGAL PARENTAGE AND THE CLASH BETWEEN CUSTODY AND CHILD SUPPORT

LESLIE JOAN HARRIS*

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot(ing) a way of life" through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.[1]

> If the genes don't fit, you must acquit; No DNA, No Pay.[2]

INTRODUCTION

During the year-long process of drafting a new paternity law for Oregon,[3] one of the most hotly contested issues was on what basis trial judges could disregard evidence that a legal father might not be the biological father. Some in the group that drafted the proposal—lawyers as well as fathers' rights advocates—fervently argued against allowing a trial judge to consider the child's best interests in making this decision.[4] Some of these advocates spoke for angry men who call

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1. Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) (internal citations omitted).

2. These slogans are posted on the U.S. Citizens Against Paternity Fraud website, http://www.paternityfraud.com/ (last visited May 31, 2009).

3. For a more complete discussion of this legislation and the process that produced it, see Leslie Joan Harris, *A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children's Interests, and Betrayal,* 44 WILLAMETTE L. REV. 297, 311-32 (2007) [hereinafter Harris, *A New Paternity Law*]; *see also* OREGON LAW COMMISSION UNIFORM PARENTAGE ACT WORK GROUP, ESTABLISHING, DISESTABLISHING AND CHALLENGING LEGAL PATERNITY 2 (2007), *available at* http://www.willamette.edu/wucl/pdf/olc/hb2382report.pdf. The work group, which consisted mostly of attorneys and judges, but also representatives from the state child welfare agency, state child support enforcement agency, and adoption agencies, was convened by the Oregon Law Commission. OREGON LAW COMMISSION UNIFORM PARENTAGE ACT WORK GROUP, *supra*, at 2. The commission is a legislatively-created entity that undertakes major law reform efforts for the state. College of Law: Oregon Law Commission, http://www.willamette.edu/wucl/oregonlawcommission (last visited May 31, 2009). I was a member of and reporter for the parentage work group.

4. *See* Harris, *A New Paternity Law*, *supra* note 3, at 318 (citing unpublished meeting

themselves victims of "paternity fraud" and argue that a man who can establish his biological nonpaternity has been betrayed by the mother and that her unfaithfulness inherently constitutes fraud.[5] These members of the work group understood paternity determination through the lens of child support determinations, which they said should be resolved solely only on the basis of what is fair as between the mother and the man alleged to be the father.

In a vain attempt to convince the work group to include the child's best interests as one factor for the judge to consider, another attorney compiled a chart showing the Oregon statutes that allow the best interests of the child to be considered in resolving other matters. She found thirty-three, including all the statutes governing custody and visitation (parenting time in Oregon parlance), as might be expected.[6] But for the fathers' rights advocates, the relationship of biological paternity to child support was overwhelmingly important.

This tale illustrates that in the United States today, there are two legal bases for parentage, biology and function. But it shows more than that: biological parenthood is usually controlling when the issue is liability for child support. Functioning as a parent is considered, if at all, only when the primary issue is custody or access to a child. These two strands of parentage law derive from what Jacobus tenBroek called the dual system of family law.[7] In the 1960s he

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minutes).

5. *See id.* at 319. Some of this group supported allowing the judge to deny a challenge to paternity based upon a showing that the party making the challenge should be estopped from denying paternity because he knew the child was not his and still assumed the paternal role (or because she had represented that the child was the husband's) and the other party had relied on this representation. *Id.* at 318-19. However, these members of the group opposed allowing the judge to consider the child's best interests in making the decision, believing that the matter should simply be an issue of equity between the adults. *See id.* at 319.

6. Ultimately the work group compromised, providing that the judge should consider what is "just and equitable to the parties and to the child" in making decisions. OREGON LAW COMMISSION UNIFORM PARENTAGE ACT WORK GROUP, *supra* note 3, at 13. The fathers' rights advocate carried his battle to the legislature, which rejected this standard. *Id.* at 13-14. As enacted, the law governing motions to set aside judgments and voluntary acknowledgments requires that, before a court denies such a motion, it must find that to do so is necessary to avoid "substantial inequity." H.B. 2382, 74th Legis. Assem., Reg. Sess. § 1 (Or. 2007); *id.* § 9(7). On the other hand, a judge may refuse to admit evidence to rebut the marital presumption or deny a request for genetic tests if it is "just and equitable, giving consideration to the interests of the parties and the child." *Id.* § 1; *id.* § 9(6).

7. tenBroek developed the distinction between public and private family law in a series of articles published in the 1960s. *See generally* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status (Part I)*, 16 STAN. L. REV. 257, 284 (1964) [hereinafter tenBroek, *Part I*]; Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status (Part II)*, 16 STAN. L. REV. 900 (1964) [hereinafter tenBroek *Part II*]; Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status (Part III)*, 17 STAN. L. REV. 614 (1965) [hereinafter tenBroek, *Part III*].

described a public system of family law that applies principally to poor people, especially recipients of public benefits, and focuses on conservation of public funds, and a private family law system that concentrates on distribution of family funds and the rights and responsibilities of family members to each other, which usually applied to middle and upper class people.[8]

While the divided law that tenBroek describes is centuries old, until fairly recently, the two strands ran in parallel and did not have much impact on each other. However, in the last several decades they have evolved and, as a result, are today on a collision course when the identity of a child's legal parents must be determined. Child support law has become predominantly welfare-driven; in tenBroek's terminology, it has taken on characteristics of "public law," regardless of whether it applies to the poor or to the upper classes.[9] The law that governs private disputes over custody, visitation and the like continues to have the characteristics of "private law."[10] The difference in these approaches is especially apparent in the law of parentage. If child support is the ultimate question, parentage will likely be determined according to biology, the principle favored by the "public law approach."[11] If custody or access is the main issue,

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When these articles were published, some questioned the existence of dual systems or at least attempted to justify some of the distinctions between them. *See generally* Thomas Lewis & Robert J. Levy, *Family Law and Welfare Policies: The Case for "Dual Systems,"* 54 CALIF. L. REV. 748 (1966). However, both tenBroek's terminology and his analysis became widely accepted and continue to be used today. *See, e.g.*, Tonya L. Brito, *The Welfarization of Family Law*, 48 KAN. L. REV. 229, 237-50 (2000); Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1211-15 (1999); Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619, 621-30 (1988-89); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 303, 357-71 (2002); Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1043-44 (2007); Amy E. Hirsch, *Income Deeming in the AFDC Program: Using Dual Track Family Law to Make Poor Women Poorer*, 16 N.Y.U. REV. L. & SOC. CHANGE 713, 715-16 (1987-1988).

8. tenBroek, *Part I*, *supra* note 7, at 257-58.

9. *See generally* Leslie J. Harris, The Dual System of Family Law at the Turn of the New Century (1999) (unpublished paper, delivered at International Society of Family Law North American Regional Conference on file with author) (discussing the expansion of poor law principles into the law of child support that applies to middle class families); *see also* LESLIE JOAN HARRIS ET AL., FAMILY LAW 576-77 (3d ed. 2005) (discussing differences between private family law and welfare law regarding familial support obligations); Leslie J. Harris et al., *Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children*, 69 OR. L. REV. 689, 716 (1990) [hereinafter Harris et al., *Making and Breaking Connections*]. Tonya Brito argues that remnants of the separate tracks remain, even in child support law, pointing out that welfare recipients must participate in the state-federal child support system while others have the choice. Brito, *supra* note 7, at 254-56, 265.

10. *See* Harris et al., *Making and Breaking Connections*, *supra* note 9, at 693.

11. *See id.* at 699.

private law principles, which tend to respect functional parenthood, are more likely to be invoked.[12] And yet, once legal parentage is determined, it applies to determine the rights and duties of the involved adults vis-à-vis the child, regardless of context.[13]

Until fairly recently, the parentage principles inherent in "private family law," particularly the presumption that a husband is the father of his wife's children, applied to most people. Since the 1970s, however, the "public law" approach, which privileged biology and applied to children of unmarried parents, has become much more important. First, over the last thirty years, the proportion of children born to unmarried mothers has trebled;[14] the marital presumption simply does not apply to them. Second, child support enforcement practices, including state-initiated determinations of paternity, have become much more aggressive during the same time period.[15] Finally, genetic testing for paternity has become cheap and readily available.[16]

This Article argues that as biology-based parentage becomes more pervasive, it threatens to displace rules based on functional parent-child relationships, which would harm many children and their families. To avoid this result, the Article argues that we need a substantive law of parentage that recognizes the importance of biology while preserving a realm in which functional relationships are protected. To make this law politically viable, we also should reject some child support rules and practices that treat men unfairly and, in so doing, suggest that biology is the only thing that matters for determining legal parentage.

The first two parts of this Article describe tenBroek's two systems of family law and show how they have evolved to create today's system for determining legal parentage. Part III examines evidence that biology-based principles of parentage threaten to crowd out functional principles, and Part IV proposes legal and policy changes that may help slow, if not reverse, this trend.

I. PARENTAGE UNDER THE TRADITIONAL TWO TRACKS OF FAMILY LAW

Traditional Anglo-American family law channeled childbearing into marriage by stigmatizing unmarried parents, especially mothers, and by stigmatizing and denying legal rights to the children of nonmarital unions.[17] The

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12. In 1996 I wrote that the law of parenthood, particularly paternity, was determined largely by biology for purposes of both custody and support and argued that the law should be based on functional relationships instead. *See* Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 462-63 [hereinafter Harris, *Reconsidering the Criteria*]. While I still think that in an ideal world, functional parenthood would be the most important criterion for legal parenthood, it does not seem likely that this view will be widely adopted any time soon.

13. *See, e.g.*, UNIF. PARENTAGE ACT § 203 (2002).

14. *See infra* Part II.A.1.

15. *See infra* Part II.A.3.

16. *See infra* Part II.A.2.

17. For a discussion of the treatment of nonmarital children at common law, see 1 WILLIAM

policy was quite effective. As late as the 1970s, about 90% of all children in the United States were born to married women.[18] Principles of private law, applicable to children born to married women, recognized the legal paternity of husbands. The picture was very different for nonmarital children. Well into the second half of the twentieth century, nonmarital children's legal relationships to their fathers were nonexistent or very limited in many states.

A. Children Born to Married Women

The main private law principle that determined paternity protected the functional family. The mother's husband was presumed to be the father of her children, a presumption that could be rebutted only by showing that the husband had been out of the kingdom of England for more than nine months.[19] Lord Mansfield's Rule, first articulated in 1777, prevented either spouse from giving testimony that cast doubt on the husband's biological paternity.[20] While some scholars have argued that the primary purpose and effect of these rules were to establish the legal parent-child relationship based on biology in an era when biological truth was often very uncertain,[21] the rules did much more. They kept highly reliable evidence that the husband was not the father of his wife's child out of court, and in the process protected the integrity of the marriage, shielded the child from stigma, and insured that responsible adults would be identified for most children.

In the eighteenth century, Blackstone wrote that parents had a moral duty to support their children, based on their having begotten the children and, by implication, voluntarily undertaken to care for them. However, children had no legally enforceable right to their fathers' care, protection, or support.[22] Fathers had rights in their children as against third parties, based on the fiction that the children were servants.[23] Nineteenth century American courts and legislatures turned parents' moral duty into a legal one, establishing that parents have a legal duty to support their children, enforceable indirectly through the necessaries

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BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *457 (Garland Publishing, Inc. 1978) (1783). Michael Grossberg discusses the law applicable in nineteenth century America. MICHAEL GROSSBERG, GOVERNING THE HEARTH ch. 6 (1985).

18. In 1970, about 10% of all births were to unmarried women. STEPHANIE J. VENTURA ET AL., CTRS. FOR DISEASE & PREVENTION, NONMARITAL CHILDBEARING IN THE UNITED STATES, 1940-99, NATIONAL VITAL STATISTICS REPORTS 1, 25, tbl. 4 (Oct. 18, 2000), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf.

19. 1 BLACKSTONE, *supra* note 17, at *457.

20. Goodright v. Moss, 98 Eng. Rep. 1257 (1777).

21. *See, e.g.*, June Carbone & Naomi Cahn, *Which Ties Bind?: Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1024 (2003). *But see* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1305 (2005).

22. 1 BLACKSTONE, *supra* note 17, at *457.

23. tenBroek, *Part I*, *supra* note 7, at 287-88.

doctrine.[24] Some nineteenth century courts developed a new rationale for requiring parents to support their children, explaining it as a corollary to their right to custody.[25] Nineteenth century statutory code drafters also grounded the support duty in the parent's right to custody.[26] Custody includes not only physical custody—living with and caring for a child day to day—but also legal custody—the authority to determine how children will live and behave. Thus, these legal developments effectively linked parents' support duty to their right to exercise control over their children,[27] a relationship between parental rights and duties that continues to be popularly accepted today.[28]

B. Children Born to Unmarried Women

The position of nonmarital children at common law contrasted starkly to that of children born to married women. Originally, these children were *nullius filius*, the children of no one,[29] although by the early nineteenth century, these children were recognized as legally related to their mothers.[30] Unmarried fathers had no

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24. *See* Harris et al., *Making and Breaking Connections*, *supra* note 9, at 693-96 (tracing American developments).

25. *Id.* at 717-20 (noting development during nineteenth century of the law of parental obligations to support older adolescent children, linking duty to right to control the children).

26. tenBroek, *Part I*, *supra* note 7, at 314. For example, under the New York Field Code the parent who was obligated to support a child was the parent entitled to custody. N.Y. CODE COMM'RS, DRAFT OF A CIVIL CODE FOR THE STATE OF NEW YORK § 89 (1862) (final draft 1865). Fathers of children born in wedlock were entitled to custody. *Id.* § 90. Mothers were entitled to custody only if the fathers were dead, unable or unwilling to assume custody or had abandoned the family. *Id.* Mothers of nonmarital children were entitled to custody. *Id.* § 91. If the father was entitled to custody, he was primarily liable for the child's support, and the mother was secondarily liable if he could not support the child adequately. *Id.* § 89.

27. One nineteenth century family law author even conceived parental authority over children as part of a contract between parents and children:

> The parent shows himself ready, by the care and affection manifested to his child, to watch over him, and to supply all his wants, until he shall be able to provide them for himself. The child, on the other hand, receives these acts of kindness; a tacit compact between them is thus formed; the child engages, by acts equivalent to a positive undertaking to submit to the care and judgment of his parent so long as the parent, and the manifest order of nature, shall coincide in requiring assistance and advice on the one side, and acceptance of them, and obedience and gratitude on the other.

DAVID HOFFMAN, LEGAL OUTLINES (1836), *quoted in* GROSSBERG, *supra* note 17, at 235. Hoffman also said that parents must have authority to enable them to discharge their duties to care for their children.

28. *See generally* Harris et al., *Making and Breaking Connections*, *supra* note 9.

29. 1 BLACKSTONE, *supra* note 17, at *454–59.

30. GROSSBERG, *supra* note 17, at 207–15. This is not to say that poor parents had the same protections regarding custody vis-à-vis the state that middle and upper class parents enjoyed. tenBroek, *Part I*, *supra* note 7, at 279-80; *see also* GROSSBERG, *supra* note 17, at 226. Nineteenth

common law duty to support their children under English or American law.[31] However, at least since the time of the Elizabethan Poor Laws, the law has required unmarried fathers to support their children if they are receiving public assistance,[32] even though enforcement of this duty has varied greatly over time. Liability under the Poor Laws was founded on the father's having voluntarily caused the child to come into existence,[33] the same rationale that Blackstone gave for requiring parents to provide for their children.[34] Nineteenth century American legislatures enacted poor laws but did not impose a child support duty on unmarried fathers outside these laws.[35]

Under the poor laws, paternity was established through a quasi-criminal bastardy action, which did not create a full-blown parent-child relationship between the man and the child. Nonmarital children had no inheritance rights even if their paternity was established. In some states this rule extended well into the twentieth century. For example, the Supreme Court's 1977 decision in *Trimble v. Gordon*[36] held unconstitutional a statute that denied the right to inherit to a nonmarital child, even though paternity had been established during the father's lifetime.[37] Under the statute, the only way the child could have been "legitimated" (i.e., become entitled to inherit) was for her parents to marry and for father to acknowledge her.[38] Further, unmarried fathers had no custodial rights even if the mothers were unavailable.[39] As late as the 1960s, Illinois did not recognize the parental status of Peter Stanley, an unmarried father who had

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century courts rejected challenges to the poor laws, often holding that parents' poverty made them per se unfit. *Id.* at 263-66.

31. Simmons v. Bull, 21 Ala. 501, 501 (1852); Nixon v. Perry, 3 S.E. 253, 253 (Ga. 1887); Shelton v. Springett, (1851) 138 Eng. Rep. 549, 550 (C.C.P.); Mortimore v. Wright, (1840) 151 Eng. Rep. 502, 504 (Exch. Ct.); Furillio v. Crowther, (1826) 16 Eccl. 302 (C.C.P.); Cameron v. Baker, (1824) 171 Eng. Rep. 1190 (Assizes); Hard's Case, (1795) 91 Eng. Rep. 22 (K.B.); *see also* 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *446-54 (Christian ed. 1807).

32. tenBroek *Part I*, *supra* note 7, at 284; *see also* R.H. Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431, 432-33 (1977). Under the Poor Laws, local authorities could remove children from parents unable to support them and apprentice them to more financially capable members of the community. A master was obliged to support and teach an apprentice the master's craft. In return, the master received the benefit of the apprentice's labor. In addition, relatives of poor people unable to work to support themselves, including parents, grandparents and children, were obligated to contribute to the support of the poor person. tenBroek *Part I*, *supra* note 7, at 257-58.

33. *See* tenBroek *Part I*, *supra* note 7, at 283-84 (describing the Elizabethan Poor Laws); *see also* tenbroek *Part II*, *supra* note 7, at 973 (describing relative responsibility laws).

34. 1 BLACKSTONE, *supra* note 17, at *457.

35. GROSSBERG, *supra* note 17, ch. 6.

36. 430 U.S. 762 (1977).

37. *Id.* at 772, 776.

38. *Id.* at 764-65; *see also* HARRY KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 105-06 (1971).

39. WALTER C. TIFFANY, PERSONS AND DOMESTIC RELATIONS § 114 (1921).

lived with his children and their mother for many years, and denied that he had a parental claim to custody when the mother died.[40]

II. The Development of Modern Parentage Law

A year after the Supreme Court held in *Stanley v. Illinois*[41] that the common law rule denying parental rights to all unmarried fathers was unconstitutional,[42] the influential Uniform Parentage Act of 1973 (1973 UPA) proposed that once the parent-child relationship is established between an unmarried man and his child, the rights and duties attendant to that relationship should be the same as for all other parents and children.[43] This equality principle does not dictate a basis for assigning legal parentage status. The law could have developed so that a child's biological parents were the legal parents for all purposes. Or, at the other extreme, the governing principle might have been that the adults who voluntarily undertook to provide for a child became legal parents. But the law took neither route. Instead, it maintained two different parentage regimes; one for children born to married women, and the other for nonmarital children.[44] However, because of the equality principle, once legal paternity is established, the man has the same rights and duties, including custody rights and support duties, regardless of whether he and the mother were married and regardless of the kind of a social relationship, if any, that he actually has with the child.[45]

At roughly the same time the Supreme Court was dismantling the strict legal distinctions between "legitimate" and "illegitimate" children and their parents, other major social and legal revolutions began. Today's law of parentage was born from the convergence of these changes.

A. The Drivers of Change

As a result of three major developments over the last thirty to thirty-five years—one demographic, one scientific, and one political—the "public law" of child support has come to apply to all families when child support is at issue. These developments are the increase in the number of children born outside marriage, improvements in genetic testing, and creation of the federal-state child support enforcement program.

1. Demography: Increased Nonmarital Childbearing.—In 1970, about 10% of all children were born to unmarried women; by 2000, about one-third were.[46] About 40% of births to Latinas occur outside marriage, and among African

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40. *In re* Stanley, 256 N.E.2d 814, 815-16 (Ill. 1970), *rev'd*, Stanley v. Illinois, 405 U.S. 645 (1972).

41. 405 U.S. 645 (1972).

42. *Id.* at 657-58.

43. Unif. Parentage Act §§ 1–2 (1973), 9B U.L.A. 387, 390 (2001).

44. *Id.* § 4.

45. *See id.* § 4; *see also* Unif. Parentage Act § 203 (2002).

46. Ventura et al., *supra* note 18, at 1-2.

Americans the figure is 70%.[47] Most nonmarital children are born to poor, young parents.[48] Using mothers' educational attainment as a proxy for class, Sarah McLanahan found that mothers in the upper quartile of educational attainment are likely to have their first child at age thirty-one and have a family income of $78,000 per year.[49] In 2000 only 7% of these mothers were single, and their divorce rate was 18%.[50] Of the least educated mothers, 42% were single, and they had a 32% divorce rate.[51] These mothers were also much younger at the time their first children were born and had lower family incomes.[52]

Thus, the number of children for whom parentage must be determined outside marriage has mushroomed. A disproportionate number of these children are born to poor single mothers and so are more at risk of needing public assistance and thus being drawn into tenBroek's public family law system.

2. Science: Genetic Testing.—By the 1990s, science had advanced to the point that in most cases a genetic test could not only exclude a man falsely identified as the biological father but could also positively identify a biological father to near-certainty.[53] Modern DNA testing traces its origins to a chance discovery by a British geneticist in 1984. In 1985 a DNA test based on his work was first used forensically to establish that a young boy was in fact closely related to adults with whom he was immigrating into the United Kingdom.[54] The test was first commercialized in 1987.[55]

Even before modern genetic testing was available, the Supreme Court held that blood testing was so important to paternity determinations that due process is violated if a man who contests paternity in an action brought by the state is denied access to the tests for lack of funds.[56] The Court said, "Without aid in

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47. *Id.* at 31.

48. Sara McLanahan, *Diverging Destinies: How Children Are Faring After the Second Demographic Transformation*, 41 DEMOGRAPHY 607, 614 (2004).

49. *Id.* at 609, 614.

50. *Id.* at 613, 615.

51. *Id.*

52. *Id.* at 610, 614.

53. For a discussion of the science behind the tests, see generally Christopher L. Blakesley, *Scientific Testing and Proof of Paternity: Some Controversy and Key Issues for Family Law Counsel*, 57 LA. L. REV. 379 (1997).

54. Nick Zagorski, *Profile of Alec J. Jeffreys*, 103 PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES 8918, 8919 (2006), *available at* http://www.pnas.org/content/103/24/8918.full.pdf. In 1986, the technique was used to prove that a man suspected of raping and murdering two girls was not guilty and to find the real murderer. In 1990, it was used to prove that skeletal remains were those of Nazi Josef Mengele. *Id.* at 8919-20.

55. The Royal Society, Sir Alec Jeffreys—DNA Fingerprinting, http://royalsociety.org/page.asp?id=1523 (last visited May 31, 2009).

56. Little v. Streater, 452 U.S. 1, 16-17 (1981) (quoting Boddie v. Connecticut, 401 U.S. 371, 377 (1971)). Federal and state law now guarantees this right. *See* 42 U.S.C. § 666(a)(5)(B) (2006). As a condition of receiving federal funds for their child support enforcement and Temporary Assistance to Needy Families (TANF) programs, States must make genetic testing available in

obtaining blood test evidence in a paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks 'a meaningful opportunity to be heard.'"[57]

Reasonably cheap, accurate genetic testing has become the norm for resolving parentage disputes that arise when child support is at stake.[58] Under this regime, parentage is simply a matter of biology. Considerations of relationships among the adults and with the child are ordinarily irrelevant.

3. Politics: Aggressive Child Support Enforcement.—The Temporary Assistance for Needy Families (TANF) program requires states to seek to establish the paternity of children born to unmarried mothers for purposes of imposing child support obligations on the men.[59] If states do not meet federally-mandated paternity establishment goals, they will lose TANF funds,[60] and states with paternity establishment rates above 50% receive incentive payments that increase as the rate increases.[61]

The child support enforcement program encourages unmarried mothers and men believed to be fathers to establish legal paternity voluntarily. All states allow mothers and alleged fathers to do this by signing a voluntary acknowledgment identifying the man as the legal father and filing it with the state.[62] This has become the most common way that legal paternity of children born to unmarried mothers is established.[63] Most of the voluntary acknowledgments are signed at the time of birth at the hospital or other birthing facility, and they can be, and often are, signed without any genetic testing having

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contested paternity cases. *Id.* § 666(a)(5)(B)(i). The child and all other parties must submit to genetic testing upon the request of any party, accompanied by "a sworn statement by the party—alleging paternity, and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or denying paternity, and setting forth facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties." *Id.* The state must pay for the tests, though it may recoup the cost from the father if paternity is established. *Id.* § 666(a)(5)(B)(ii).

57. *Little*, 452 U.S. at 16 (citation omitted).

58. The number of paternity tests more than doubled between 1995 and 2003, while the cost was halved. Mireya Navarro, *Painless Paternity Tests, but the Truth May Hurt*, N.Y. TIMES, Oct. 2, 2005, at 91.

59. For discussions of how paternity law reforms were driven by welfare principles, see Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children,* 81 NOTRE DAME L. REV. 325, 346 (2005); Brito, *supra* note 7, at 256-60.

60. *See* 42 U.S.C. § 652(g) (2006). States must seek to attain a 90% paternity establishment rate. States with rates below that level must show steady improvement. *See id.* § 652(g)(1).

61. *Id.* § 658a(b)(6).

62. The federal requirements are set out in 42 U.S.C. § 666(a)(5)(C) (2006).

63. DEP'T OF HEALTH & HUMAN SERV., CHILD SUPPORT ENFORCEMENT, FY 2005 PRELIMINARY REPORT (2006), http://www.acf.hhs.gov/programs/cse/pubs/2006/reports/preliminary_report/ (last visited May 31, 2009).

been done.[64]

The other way that paternity of children born to unmarried mothers is commonly established is through an administrative or judicial process that establishes legal judgments of paternity. Blood testing is available, but orders are frequently entered when testing has not been done. This generally occurs because the man alleged to be the father does not contest the action, believing that he is the father, or because he does not respond and a default order is entered.[65]

A mother must cooperate in paternity establishment efforts if she and her child are receiving TANF, unless a relatively narrow exception applies.[66] While paternity establishment is optional for other parents, the hospital establishment procedures described above are available to all parents, as is the state machinery for establishing and enforcing child support orders. Moreover, commercial paternity testing services are widely available to resolve suspicions about biological paternity.[67]

For all these reasons, it is far more likely that paternity of a nonmarital child will be established today than it was thirty years ago and that the man identified as the biological father will be ordered to pay child support. Between 1992 and 2000, paternity establishment increased from 500,000 to 1.5 million children per year.[68] In fiscal year 2005, "[p]aternity was established or acknowledged for over 1.6 million children, a 1.5 percent increase from fiscal year 2004."[69]

The welfare-driven child support system, including its emphasis on biology as the basis for legal paternity, is directly applicable to many more children and parents than it was thirty years ago. Its biology-based principles of parentage affect many more families. The rest of this section describes the legal principles of parentage that prevail when custody or a related issue is at stake and contrasts them with the biology-based parentage law that has developed when child support is the main issue.

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64. Dep't of Human Services, Establishing Paternity, http://www.michigan.gov/dhs/0,1607,7-124-5453_5528_41278---,00.html (last visited May 31, 2009). In a study of 1660 unwed births at hospitals, paternity was voluntarily established in 78.5% of the cases, but in only 112 cases was a genetic test requested before an acknowledgment of paternity was signed. Harris, *A New Paternity Law*, *supra* note 3, at 302 n.25.

65. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., PATERNITY ESTABLISHMENT: ADMINISTRATIVE AND JUDICIAL METHODS 15 (2000).

66. 42 U.S.C. § 654(29)(A) (2006).

67. For example, conducting a search on Google with the term "paternity testing" brings up pages of labs offering tests.

68. PAUL LEGLER, LOW-INCOME FATHERS AND CHILD SUPPORT: STARTING OFF ON THE RIGHT TRACK 6 (2003), *available at* http://www.aecf.org/upload/PublicationFiles/starting%20off.pdf; *see also* Virginia Ellis, *Fathers' Legal Ties that Bind Children*, L.A. TIMES, Mar. 8, 1998, at A1 (highlighting the increase in paternity filings since the January 1997 enactment of a state law and finding a 600% increase in the number of fathers signing paternity declarations in 1997).

69. DEP'T OF HEALTH & HUMAN SERV., *supra* note 65.

B. Parentage Law for Custody—the Importance of Relationship

Generally, custody law focuses on the child. Protecting the child's best interests is the central goal. While "best interests" can be defined in many ways, for many years the child's interests have been examined primarily through the lens of psychological and emotional well-being. This means, among other things, that biological parentage is not a necessary element of an adult's claim for protection of his or her relationship with a child. Instead, the key claim is that if the adult and child share a caring, nurturing relationship, then protecting it will benefit the child.[70] An adult who seeks recognition as a child's legal parent must offer at least the promise of such a relationship.[71] The legal doctrines that recognize these principles have been developed, for the most part, through private litigation.[72] Thus, this law is private law, to use tenBroek's term, and it developed at the instigation of parents wealthy enough to be able to pay attorneys to litigate cases through the appellate system, though it applies to all families. In most cases, children's legal parents are their biological parents, but the emphasis on protecting children's functional parent-child relationships is reflected in various legal rules that can result in adults being designated as legal parents even though they are not biological parents.[73]

The first and most widely applicable of these rules is the marital presumption of paternity.[74] Although the conclusive presumption that a woman's husband is the father of her children is all but dead,[75] all states still recognize a rebuttable

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70. This emphasis on the child's relationship with caring adults is often traced to Joseph Goldstein, Anna Freud and Albert J. Sonit's book, BEYOND THE BEST INTERESTS OF THE CHILD (1973). About a decade later, Carl Schneider argued that over the previous twenty years American family law generally had shifted toward a psychological view of family affairs, largely abandoning moral discourse. *See* Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1805 (1985).

71. *See infra* notes 81-82 and accompanying text (discussing custodial rights of unmarried fathers).

72. A notable exception in the case law is a line of dependency cases from California holding that a man who is not the biological father of a child may nevertheless be the legal father because he held out the child as his own. These cases allow such men to be designated as legal fathers even in the face of clear evidence that they are not the biological fathers because to do so advances the child's best interests. *See, e.g.*, *In re* Jesusa V., 85 P.3d 2 (Cal. 2004); *In re* Nicholas H., 46 P.3d 932 (Cal. 2002).

73. Adoption establishes a legal parent-child relationship between an adult and child who is not the biological offspring of the adult, but adoption is not the focus of this section.

74. On the marital presumption generally, see Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547 (2000); *see also* Carbone, *supra* note 21, at 1304.

75. Two states, California and Oregon, retain a limited conclusive presumption that prevents third parties from challenging the husband's paternity when the marriage is intact if the spouses object. CAL. FAM. CODE §§ 7540, 7541 (West 2004); OR. REV. STAT. ANN. § 109.070(2) (West 2003 & Supp. 2009). The constitutionality of an earlier version of the California conclusive

presumption that a husband is the father of a child born to his wife or within a short period after the marriage ends.[76] If a woman's husband is not the biological father but the presumption is never challenged, then the husband will always be the legal father. If the presumption is challenged by the offer of genetic evidence, a number of states have held that a court can refuse to admit that evidence if contrary to the child's best interests.[77] Other courts have reached the same result on the basis that the party offering the rebuttal evidence is estopped to deny parentage because of the detrimental reliance of the other party or, sometimes, the child.[78]

The rule that a married woman's husband is presumed to be the father of her children has been adapted in a number of states allowing same-sex marriage, civil unions, or domestic partnerships, so that adult partners of legal parents are also

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presumption was upheld against a biological father's due process challenge in *Michael H. v. Gerald D.*, 491 U.S. 110, 118-30 (1989).

76. *See, e.g.*, UNIF. PARENTAGE ACT § 204 (2002).

77. *See, e.g.*, Ban v. Quigley, 812 P.2d 1014, 1018-19 (Ariz. Ct. App. 1990) (remanding for determination of whether allowing putative father's attempt to require blood test would be in best interests of child); Dep't of Health & Rehab. Serv. v. Privette, 617 So. 2d 305, 309-10 (Fla. 1993) (remanding for determination of whether admission of blood tests showing husband was not father, opposed by third party in child-support action against him, is in best interests of child); *In re* Marriage of Ross, 783 P.2d 331, 338-39 (Kan. 1989) (remanding for determination of whether allowing mother's attempt to require blood tests would be in best interests of child); Turner v. Whisted, 607 A.2d 935, 940 (Md. 1992) (remanding for determination of whether allowing putative father's attempt to require blood test would be in best interests of child); M.F. v. N.H., 599 A.2d 1297, 1302 (N.J. Sup. Ct. App. Div. 1991) (same); B.H. v. K.D., 506 N.W.2d 368, 378 (N.D. 1993) (refusing putative father's attempt to require blood test to determine paternity); Michael K.T. v. Tina L.T., 387 S.E.2d 866, 872-73 (W. Va. 1989) (remanding for determination whether admission of blood tests showing husband was not father, at husband's request in divorce action, was in best interests of child); *In re* Paternity of C.A.S., 468 N.W.2d 719, 729 (Wis. 1991) (applying statute and refusing putative father's attempt to require blood test to determine paternity); *In re* Adoption of R.S.C., 837 P.2d 1089, 1092-94 (Wyo. 1992) (holding that presumptive but not biological father's status could not be challenged later by mother in effort to have child adopted by another man); *see also In re* J.W.F., 799 P.2d 710, 716 (Utah 1990) (allowing child's guardian ad litem to challenge presumption where child had no relationship to husband).

78. *See In re* Marriage of K.E.V., 883 P.2d 1246, 1252-53 (Mont. 1994) (holding mother's actions estopped her from challenging husband's paternity of child); M.H.B. v. H.T.V., 498 A.2d 775, 779-81 (N.J. 1985) (holding father's actions estopped him from challenging his paternity of child); *In re* Adoption of Young, 364 A.2d 1307, 1310-13 (Pa. 1976) (holding mother's actions estopped her from challenging husband's paternity of child); Manze v. Manze, 523 A.2d 821, 824-26 (Pa. Super. Ct. 1987) (holding father's actions estopped him from challenging his paternity of child); Pettinato v. Pettinato, 582 A.2d 909, 912-13 (R.I. 1990) (holding mother's actions estopped her from challenging husband's paternity of child); *In re* Marriage of D.L.J. & R.R.J., 469 N.W.2d 877, 879-81 (Wis. Ct. App. 1991) (same), *abrogated by* Randy A.J. v. Norma I.J., 677 N.W.2d 630 (Wis. 2004); *In re* Adoption of R.S.C., 837 P.2d 1089, 1093-95 (Wyo. 1992) (same); *see also* Carbone, *supra* note 21, at 1308-09, 1318-21.

legal parents, even though they are clearly not biological parents. In several states, statutes provide that couples who enter into a civil union or domestic partnership have all the rights and duties of marriage that state law can bestow on them, including the presumption that each is the legal parent of children born to the other during the relationship.[79] While it is not certain how the presumption of parentage can be rebutted under these statutes, it is at least clear that proof of lack of a biological relationship is not sufficient. If it were, the whole enterprise of creating the presumption would have been futile.[80]

While traditionally the paternity of nonmarital children was based on biology, the 1973 UPA, promulgated to address the requirement that unmarried fathers be recognized as legal parents in some circumstances, created a limited functional paternity rule for unmarried fathers. The 1973 UPA provides that a man is presumed to be the child's father if he has taken the child into his home and held himself out as the father for two years.[81] A similar provision has been enacted in at least eleven states and most do not impose the two-year time limit.[82]

Finally, courts in a number of states have held that an adult caregiver who is not biologically related to a child may have custodial or visitation rights as to the child, using a "psychological parent" or "de facto parent" analysis.[83] These cases

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79. *See, e.g.*, CAL. FAM. CODE § 297.5(d) (West 2004 & Supp. 2009) (domestic partnership); CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2009) (civil union); VT. STAT. ANN. tit. 15, § 1204(f) (West 2007) (civil union); OR. LAWS 2007 ch. 99 § 9(3) (domestic partnership); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003). For a discussion of the extension of the marital presumption to same-sex couples, men as well as women, see generally Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006).

80. Appleton, *supra* note 79, at 290-91.

81. UNIF. PARENTAGE ACT § 4(a)(4) (1973). The 2002 UPA requires that the period of holding out occur for the first two years of the child's life and is, therefore, more limited than the 1973 version. UNIF. PARENTAGE ACT § 204(a)(5) (2002).

82. CAL. FAM. CODE § 7611(d) (West 2004 & Supp. 2009); DEL. CODE ANN. tit. 13, § 8-204(a)(5) (West 2006) (first two years); HAW. REV. STAT. ANN. § 584-4(a)(4) (LexisNexis 2005); IND. CODE § 31-14-7-2 (2008); MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(4) (West 2007); MINN. STAT. ANN. § 257.55 Subdiv. 1(d) (West 2007); MONT. CODE ANN. § 40-6-105(1)(d) (2007); NEV. REV. STAT. ANN. § 126.051(1)(d) (West 2008); N.M. STAT. ANN. § 40-11-5(A)(4) (West 2003); N.D. CENT. CODE § 14-17-04(1)(d) (2004); 23 PA. CONS. STAT. ANN. § 5102(b)(2) (West 2004); WYO. STAT. ANN. § 14-2-504(a)(v) (West 2007) (first two years).

83. Katharine T. Barlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (early and influential article discussing these theories); *see also* NANCY E. DOWD, REDEFINING FATHERHOOD (2000); Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231, 257 (2007) [hereinafter Dowd, *Multiple Parents/Multiple Fathers*]; Harris, *Reconsidering the Criteria*, *supra* note 12, at 469-70; Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 201, 209 (2007); Martha L. Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270 (1991); E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence*

are especially likely to be invoked when a child is born through assisted reproductive technology[84] or is raised by lesbian co-parents.[85] In some states, the de facto parent is in effect a legal parent and stands on equal footing with other legal parents.[86] In others, the de facto or psychological parent is not a legal parent and must overcome the constitutionally-mandated assumption that the legal parent's decisions regarding the child should control.[87]

The foregoing examples all result in a person having the rights of a legal parent even though he or she is not the biological parent. Another important rule has the opposite result—a biological parent is denied the custody-related rights of a legal parent. In these cases an unmarried father whose biological paternity has not been established legally seeks some kind of custodial right. *Stanley v. Illinois*[88] was the first such case to reach the Supreme Court. In subsequent cases the Court refined the test for determining when an unmarried father's custodial rights are constitutionally protected so that now men only receive protection if

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of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child, 48 ARIZ. L. REV. 97, 110 (2006); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1786-90 (1993); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER SOC. POL'Y & L. 505, 518 (1998).

84. California has led the way in this analysis. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998). For discussions, see R. Alta Charo, *And Baby Makes Three—or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231, 231-34 (2000); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 341-44; Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 639-40 (2002). *See generally* Janet L. Dolgin, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE (1997).

85. *See generally* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

In California, the supreme court has adapted a statute drafted for paternity issues to support the judgment that a child raised by lesbian co-parents has two legal mothers, the one who bore the child and the one who lived with and held the child out as hers. K.M. v. E.G., 117 P.3d 673, 675-78 (Cal. 2005) (holding that a woman who donated her ova to lesbian partner who bore the children is a parent under California's version of the UPA, as her genetic relationship constitutes evidence of the mother and child relationship, just as the partner's giving birth to the children also evidences a mother-child relationship); Elisa B v. Superior Court, 117 P.3d 660, 662 (Cal. 2005) (holding that a woman who supported her lesbian partner's use of artificial insemination and received the children into her home and held them out as her children is a parent under the Uniform Parentage Act).

86. *See, e.g.*, *In re* Parentage of L.B., 122 P.3d 161, 173-76 (Wash. 2005); *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435-36 (Wis. 1995).

87. This requirement is imposed by *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).

88. 405 U.S. 645 (1972).

they step forward to shoulder parental responsibilities, such as providing economic support, personal care, or both.[89] A number of states have accepted the Court's invitation to deny full parental rights to unwed fathers who have not acted in ways that establish willingness to assume parental responsibilities. However, courts in these states still tend to require that biological fathers have a substantial opportunity to exhibit such behavior, even when this opportunity disrupts children's lives in other families.[90] Several other states protect the custodial claims of unwed fathers to a far greater extent than is constitutionally necessary, even if the consequence is disrupting the family in which the child has been living with committed functional parents.[91]

C. Parentage in the Child Support Realm—Biology Rules

Child support law has taken on the characteristics of public family law, regardless of to whom it is applied, as described above.[92] A great deal of state child support legislation is dictated by federal TANF requirements, and state child support enforcement agencies do much of the implementation of the law. Child support law, including rules regarding parentage, is driven by the imperatives of the enforcement system, which needs simple, clear rules that are easy to administer. Nuanced, highly fact-specific standards such as "best interests of the child" do not work in this setting. This need, along with the traditional emphasis on biology as the basis for imposing child support obligations on unmarried men, makes biology an ideal basis for parentage determination in this system. While child support enforcement officials often argue that children deserve to know who their fathers are or that determining biological paternity protects the child's best interests, these were not the main motivations for the federal requirements that states ramp up their paternity

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89. *See* Lehr v. Robertson, 463 U.S. 248, 258-61 (1983); Caban v. Mohammed, 441 U.S. 380, 384-94 (1979); Quilloin v. Walcott, 434 U.S. 246, 247-48 (1978).

90. *See, e.g.*, C.V. v. J.M.J., 810 So. 2d 692, 697 (Ala. Civ. App. 1999), *rev'd and remanded with instructions*, *Ex parte* C.V., 810 So. 2d 700 (Ala. 2001); Adoption of Michael H., 898 P.2d 891, 895-96 (Cal. 1995) (en banc); Adoption of Kelsey S., 823 P.2d 1216, 1231-32 (Cal. 1992); Appeal of H.R., 581 A.2d 1141, 1162–63 (D.C. 1990); *In re* Adoption of Doe, 543 So. 2d 741, 746-47 (Fla. 1989); Smith v. Malouf, 722 So. 2d 490, 497 (Miss. 1998); *In re* Raquel Marie X, 559 N.E.2d 418, 419 (N.Y. 1990); *In re* Baby Boy K., 546 N.W.2d 86, 91 (S.D. 1996); Nale v. Robertson, 871 S.W.2d 674, 680 (Tenn. 1994); Kessel v. Leavitt, 511 S.E.2d 720, 747–50 (W. Va. 1998). For details and additional examples, see Harris, *Reconsidering the Criteria*, *supra* note 12, at 468-73.

91. *See, e.g.*, *In re* Petition of Kirchner, 649 N.E.2d 324, 332 (Ill. 1995) (Baby Richard case), *abrogated by In re* R.L.S., 844 N.E.2d 22 (Ill. 2006); *In re* B.G.C., 496 N.W.2d 239, 246 (Iowa 1992) (Baby Jessica case). After these two cases gained such notoriety, a number of states amended their laws to head off similar results. *See generally* David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753 (1999).

92. See supra notes 7-11 and accompanying text.

establishment programs.[93]

The principle of holding biological fathers responsible for supporting their children has resulted in some extreme judicial holdings, perhaps the most well-known of which are the "statutory rape" rule and the "lie about contraception" rule.[94] Applying the statutory rape rule, a number of courts have held that teenage and even pre-teen boys, all too young to be able to consent to sexual intercourse, were liable for child support for their children born to older girls and adult women.[95] One court reached this conclusion even though it expressly acknowledged that there was very little chance that any money would ever be collected.[96]

In the "lie about contraception" cases, biological fathers have argued that they should not be required to pay child support because the mothers intentionally misrepresented that they were using birth control.[97] To the author's

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93. Brito, *supra* note 7, at 259 (discussing the Personal Responsibility Act's token provisions regarding involvement of noncustodial fathers in children's lives).

As Tonya Brito has observed, the welfare-driven rhetoric that is so hostile toward fathers, such as the condemnation of deadbeat dads, emerged when child support became a central concern of the welfare system and spread to all fathers who owe child support. *Id.* at 263-64 (citing David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2576 (1995)). This rhetoric supports draconian child support enforcement measures, as well as justifying simplified stories of family relationships of unmarried parents and their children that give little or no consideration to the alternate views that some of these mothers and fathers actually have. *Id.*; Murphy, *supra* note 59, at 353-55.

94. *See* sources cited *infra* notes 96-99.

95. *See* sources cited *infra* note 96.

96. County of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843, 844-45 (App. 1996) (fifteen-year-old boy who had sex with a thirty-four-year-old woman); *see also* Dep't of Revenue v. Miller, 688 So. 2d 1024, 1025 (Fla. Dist. Ct. App. 1997) (fifteen-year-old boy and twenty-year-old woman); State *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273, 1274, 1279-80 (Kan. 1993) (twelve-year-old boy held liable for support of child born to sixteen-year-old girl, even though the state welfare office conceded that there was very little chance any money would be collected; collecting cases from other jurisdictions).

97. *See, e.g.*, Erwin L.D. v. Myla Jean L., 847 S.W.2d 45, 46 (Ark. Ct. App. 1993); Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619 (Ct. App. 1980); Wallis v. Smith, 2001-NMCA-17, 130 N.M. 214, 22 P.3d 682, 686 (N.M. 2001); Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 245-46 (Sup. Ct. 1985); Hughes v. Hutt, 455 A.2d 623, 624 (Pa. 1983); Linda D. v. Fritz C., 687 P.2d 223, 224 (Wash. Ct. App. 1984).

These and related issues are discussed in Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit that Interferes with Parent-Child Relationships*, 33 LOY. L.A. L. REV. 449, 501-08 (2000); Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J. L. & PUB. POL'Y 29, 51-61 (2003); Niccol D. Kording, *Little White Lies that Destroy Children's Lives—Recreating Paternity Fraud Laws to Protect Children's Interests*, 6 J.L. & FAM. STUD. 237, 249-64 (2004); Pinhas Shifman, *Involuntary Parenthood: Misrepresentation as to the Use of Contraceptives*, 4 INT'L J.L. & FAM. 279, 280-86 (1990); Adrienne D. Gross, Note, *A Man's Right to Choose:*

knowledge, this claim has never been successful. Courts simply do not find this conduct to be fraud, or courts say that even if it is, excusing the man from the child support obligation is not the remedy.[98] In a more sophisticated attempt to avoid liability, the biological father in *In re L. Pamela P.*[99] argued that he had a constitutionally protected right to choose whether to be a parent and finding him to be the child's legal father for purposes of the support duty unconstitutionally infringed upon that right.[100] The New York Court of Appeals rejected his argument because although a man has a right to decide whether to be a *biological* parent, the constitution only protects individuals against governmental interference with private choice.[101] The court said that in this case Pamela, a private individual, interfered with Frank's choice, and the constitution provided no redress.[102] In contrast, the Sixth Circuit in *Dubay v. Wells*[103] agreed with the father that the critical question in such a case is whether the man is the child's legal father, an issue determined by state law, not by the mother.[104] However, the *Dubay* court rejected the man's equal protection argument, finding that the statutory provision making him the child's legal father was rationally related to the state's interest in "'ensur[ing] that the minor children born outside a marriage are provided with support and education.'"[105]

In addition to these cases holding men liable for child support despite the unfairness to them, the law's insistence that biology is the appropriate basis for child support also manifests itself in cases where mothers argue that men should be estopped from denying paternity because they represented that they would act as the children's fathers, and the mothers or children detrimentally relied on the

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Searching for Remedies in the Face of Unplanned Fatherhood, 55 DRAKE L. REV. 1015, 1021-25 (2007).

98. However, in *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579, at *5 (Ill. App. Ct. Feb. 22, 2005), the court held that a man had stated a cause of action for intentional infliction of emotional distress when a woman allegedly performed oral sex on him, saved the sperm in her mouth, and later used it to artificially inseminate herself and had his biological child. The man filed suit after the mother sued him to establish his paternity, a suit that was apparently successful. *Id.* at *1.

99. 449 N.E.2d 713 (N.Y. 1983).

100. *Id.* at 715. The biological father was Frank Serpico, a New York City police officer who testified about corruption on the police force before an investigatory commission appointed by then-Mayor John Lindsay after the *New York Times* published a front-page story about his allegations. A best-selling biography was made into a movie starring Al Pacino. Wikipedia.org, Frank Serpico, http://en.wikipedia.org/wiki/Frank_Serpico (last visited June 1, 2009).

101. *In re L. Pamela P.*, 449 N.E.2d at 716.

102. *Id.*

103. 2007 FED App. 0442P, 506 F.3d 422 (6th Cir.).

104. *Id.* at 430 n.4.

105. *Id.* at 430 (quoting Crego v. Coleman, 615 N.W.2d 218, 228 (Mich. 2000)). The court rejected the man's argument for increased scrutiny, denying that the man's right to avoid designation as the legal father was not analogous to the right of a woman to decide whether to bear a child or that the statute classified and treated people differently based on gender. *Id.* at 429-30.

representations. While some courts have held that these allegations state a claim for relief,[106] they typically require a very strong showing of detrimental reliance on the man's representations that he would act as the father. For example, in *Miller v. Miller*,[107] the court held that a stepfather would be liable only if he encouraged the child to rely on him for support and the child would suffer financial harm if the stepfather were allowed to repudiate the financial obligation.[108] Psychological reliance is rarely sufficient to justify imposing a support obligation.

Some courts go further, refusing to apply principles that they used to grant men rights to custody or visitation with children to disputes over child support. For example, the Nebraska Supreme Court held in *Hickenbottom v. Hickenbottom*[109] that a trial court has inherent authority to allow a stepparent to visit after a divorce if in the best interests of the child.[110] Five years later, in *Quintela v. Quintela*[111] the court refused to apply this analysis in a case concerning the child support obligation of a divorcing stepfather.[112] The court distinguished *Hickenbottom* on the basis that a nonparent can stand in loco parentis to a child only if he or she wants to.[113] However, the court remanded to the trial court to allow the mother to try to prove that the stepfather was estopped from denying parental status to avoid doing harm to the child.[114]

Finally, mothers typically do not even bother to argue that the best interests of the child should preclude a man from disclaiming the role of father, even though, of course, it might well be in the child's best interests if the man paid child support. Best interests is just not an issue when it comes to determining parentage for purposes of child support.

The American Law Institute's Principles of the Law of Family Dissolution (Principles) perpetuate the disparate rules regarding the custodial rights and child support duties of adults who have lived in caretaking roles with children, without

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106. *See, e.g.*, M.H.B. v. H.T.B., 498 A.2d 775, 778 (N.J. 1985); A.S. v. B.S., 354 A.2d 100, 102-03 (N.J. Super. Ct. Ch. Div. 1976), *aff'd*, 374 A.2d 1259 (N.J. Super. Ct. App. Div. 1977); Niesen v. Niesen, 157 N.W.2d 660, 663 (Wis. 1968); *see also* Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 40-60 (1984).

107. 478 A.2d 351 (N.J. 1984).

108. *Id.* at 357-58; *see also M.H.B.*, 498 A.2d at 777-78 (applying *Miller* test). Courts rarely find that the facts support a finding of estoppel. K.A.T. v. C.A.B., 645 A.2d 570, 573-74 (D.C. 1994); Portuondo v. Portuondo, 570 So. 2d 1338, 1342 (Fla. Dist. Ct. App. 1990); Markov v. Markov, 758 A.2d 75, 83 (Md. 2000); A.R. v. C.R., 583 N.E.2d 840, 843 (Mass. 1992); Murphy v. Murphy, 714 A.2d 576, 581 (R.I. 1998); E.H. v. M.H., 512 N.W.2d 148, 148-49 (S.D. 1994); Wiese v. Wiese, 699 P.2d 700, 702 (Utah 1985); Ulrich v. Cornell, 484 N.W.2d 545, 549 (Wis. 1992).

109. 477 N.W.2d 8 (Neb. 1991).

110. *Id.* at 16.

111. 544 N.W.2d 111 (Neb. Ct. App. 1996).

112. *Id.* at 117.

113. *Id.* at 115-16.

114. *Id.* at 120.

explaining why.[115]

The Principles allow child support duties to be imposed on one other than a legal parent only if:

> (a) there was an explicit or implicit agreement or undertaking by the person to assume a parental-support obligation to the child; (b) the child was born during the marriage or cohabitation of the person and the child's parent; or (c) the child was conceived pursuant to an agreement between the person and the child's parent that they would share responsibility for raising the child and each would be a parent to the child.[116]

A person who formerly lived with or was married to a child's parents does not automatically acquire support obligations under this section.[117] The Principles add that a support duty should be imposed only when the would-be obligor's actions have eliminated or greatly reduced the chance that support can be obtained from the child's absent parent.[118]

For purposes of custodial and access rights, the Principles provide that a "parent by estoppel" has full parental rights.[119] A person may become a parent by estoppel by: (i) being obliged to pay child support under the provisions described above, (ii) living with the child for at least two years while having a good faith belief that he is the child's biological father, based on marriage to the mother or the mother's representations, and he has accepted full parental responsibilities, (iii) living with the child since the child's birth and, pursuant to a co-parenting agreement with the child's legal parent or parents, holding out and accepting full and permanent parental responsibilities, and a court finds that recognizing the relationship is in the child's best interests, or (iv) living with the child for at least two years and, pursuant to an agreement with the child's parent or parents, holding out and accepting full and permanent parental responsibilities, and a court finds that recognizing the relationship is in the child's best interests.[120] In effect, the legal position of a parent by estoppel is the same as that of a legal parent; in most states, a parent by estoppel would simply be considered a legal parent.

The Principles also recognize the status of "de facto parent," which requires that the adult live with the child for at least two years and, for reasons other than financial compensation, regularly perform as much of the caretaking functions for the child as the child's parent(s), either with the agreement of the child's legal

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115. *See generally* Katherine K. Baker, *Asymmetric Parenthood*, *in* RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson ed., 2006).

116. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS OF RECOMMENDATIONS § 3.03(1) (2002).

117. *Id.* § 3.03.

118. *Id.* § 3.01(b).

119. *Id.* § 2.03(1)(b) cmt. b.

120. *Id.* § 2.03(1)(b).

parent(s) or because of the parents' inability to act as parents.[121] Unlike a parent by estoppel, who has rights equivalent to those of a legal parent,[122] a de facto parent's rights are subordinated to the rights of legal parents and parents by estoppel.[123] In addition, the de facto parent has standing to bring an action for custody or access only if he or she has lived with the child within six months of filing or has "consistently maintained or attempted to maintain the parental relationship" since ceasing to live with the child.[124] A parent by estoppel's standing is not so limited.[125]

As this brief survey shows, in the difficult cases where a social parent is not necessarily a biological parent or vice versa, whether a court will recognize the claimant as a legal parent may depend on whether the dispute concerns custody, visitation or a similar right, or whether it is about child support. If the dispute concerns custody and the adult not biologically related to the child prevails, that adult may be a full parent with support obligations, depending on the nature of the order.[126] On the other hand, if parentage is declared in the context of a child support dispute, the person becomes the legal parent for all purposes, custody as well as support.[127]

III. THE RISK: BIOLOGY COULD CROWD OUT FUNCTION

It is by now a cliché that most children do not live in the idealized family of a married mother and father with only their biological children. Between 1970 and 1990, the proportion of children living only with their mothers doubled from 11% to 22% of all children; since 1990, the changes have leveled off.[128] In 2001,

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121. *Id.* § 2.03(1)(c).

122. *Id.* §§ 2.08(1)(a), 2.09.

123. *Id.* § 2.18(1).

124. *Id.* § 2.04(1)(c).

125. *Id.* § 2.04(1)(b). The Principles were drafted before the Supreme Court decided *Troxel v. Granville*, 530 U.S. 57 (2000), and so do not take account of that case, which held that legal parents are constitutionally entitled to determine whether a child will visit an outsider to the residential family and that courts must give substantial weight to this decision. *Id.* at 65-66. Emily Buss argues that *Troxel* does not limit states' ability to determine the criteria for legal parenthood, but says that if a state does not recognize a caregiver as a legal parent, the *Troxel* rules require giving preference to the legally recognized parent. Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 638-40 (2002). This issue is also at the heart of *In re Nelson*, 825 A.2d 502 (N.H. 2003). Finally, David Meyer discusses cases from Maine, Massachusetts, and Rhode Island that have cited the de facto parent provisions of the Principles to support awarding custody to adults not biologically related to children. David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, *in* RECONCEIVING THE FAMILY 47, 52 (Robin Fretwell Wilson ed., 2006) (citing E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999); C.E.W. v. D.E.W., 2004 ME 43, 845 A.2d 1146, 1152 (Me. 2004); Rubano v. DiCenzo, 759 A.2d 959, 974-75 (R.I. 2000)).

126. *See supra* notes 12-13 and accompanying text.

127. *See, e.g.*, UNIF. PARENTAGE ACT § 203 (2002).

128. ROSE M. KREIDER & JASON FIELDS, U.S. DEP'T OF COM., LIVING ARRANGEMENTS OF

18.5 million children lived with only one parent; 2.2 million lived with their fathers, and 16.3 million with their mothers.[129] The 1997 National Survey of America's Families found an even higher rate of separation of parents and children. It reported that a third of all children younger than age eighteen live apart from a parent, and 83% of this group live with a mother rather than a father.[130] In 2001 almost fifteen million children lived in blended families (with stepparents, stepsiblings, or both), including 4.9 million who lived with a stepparent.[131]

In many situations involving these families, courts and other decisionmakers should be able to consider whether parental rights and duties should be based on proof of a functional parent-child relationship, rather than on biology. However, the increasing pervasiveness of the biology-based child support model of parenthood threatens the viability of this option. Some courts refuse to consider whether to apply a functional parenthood theory even in cases involving custody and visitation,[132] instead treating biology as the only basis for legal parenthood. An even more significant and recent development is the paternity disestablishment movement, which has blossomed over the last ten years.[133]

In paternity disestablishment cases, one of the legal parents, usually the father, seeks a court order declaring that he is not the legal father, based on genetic testing. Husbands have been allowed to disestablish paternity at the time of divorce in at least six jurisdictions, regardless of the children's ages and relationships to the men.[134] Statutes in several states require that paternity be

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CHILDREN: 2001, at 12 (2005).

129. *Id.* at 2. Children of color were more likely than white children to live with only one parent. In 2001, 51% of black children lived with only one parent, compared with 19% of non-Hispanic white children and 26% of Hispanic children. *Id.*

130. FREYA SONENSTEIN ET AL., STUDY OF FATHERS' INVOLVEMENT IN PERMANENCY PLANNING AND CHILD WELFARE CASEWORK (2002), *available at* http://aspe.hhs.gov/hsp/CW-dads02/#II.

131. KREIDER & FIELDS, *supra* note 128, at 2, 4, 6-7.

132. *See, e.g.*, Hughes v. Creighton, 798 P.2d 403, 405-06 (Ariz. Ct. App. 1990); Janice M. v. Margaret K., 948 A.2d 73, 74-75 (Md. 2008); Van v. Zahorik, 575 N.W.2d 566, 569 (Mich. Ct. App. 1998); Jefferson v. Jefferson, 137 S.W.3d 510, 512 (Mo. Ct. App. 2004); Alison D. v. Virginia M., 572 N.E.2d 27, 29-30 (N.Y. 1991); Ronald FF v. Cindy GG, 511 N.E.2d 75, 77 (N.Y. 1987); Cooper v. Merkel, 470 N.W.2d 253, 255-56 (S.D. 1991); *see also* Ronald K. Henry, *The Innocent Third Party: Victims of Paternity Fraud*, 40 FAM. L.Q. 51, 65-69 (2006).

133. *See* Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 193-94 (2004); Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 37-38 (2003); Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 58 (2003); Paula Roberts, *Truth and Consequences: Part III. Who Pays When Paternity Is Disestablished?*, 37 FAM. L.Q. 69, 69 (2003).

134. Appleton, *supra* note 79, at 236 n.36 (citing T.P.D. v. A.C.D., 981 P.2d 116, 120, 121 (Alaska 1999) (rejecting equitable estoppel and paternity by laches)); Cochran v. Cochran, 717 N.E.2d 892, 894-95 (Ind. Ct. App. 1999) (allowing disestablishment); Williams v. Williams, 01-

disestablished and a man relieved of the obligation to pay child support if he can prove at any time that he is not the child's biological parent.[135] The material consequences of allowing paternity disestablishment for the child may be very drastic, especially since there is no guarantee that legal paternity of the child's biological father will ever be established. But the emotional consequences for the child and the broader social consequences may be even more significant. As bioethicist Mary Anderlik has written:

> Parentage testing bears on important matters such as identity and health. Testing carries risks of psychological harm to the child tested and to adults whose beliefs may be at odds with the reality revealed by testing. Testing of a child by a man believed to be the child's father, or infidelity testing, may provide proof of betrayal and deception and set the stage for family discord and even violence. One respondent reported that a man with custody killed the child after learning that he was not the biological father .... Finally, individual decisions to seek testing, in the aggregate, may have profound social consequences. The promotion of testing as a natural and acceptable response to suspicion, combined with easy access to testing, may further erode already fragile family relationships.[136]

IV. STEPS TOWARD A SOLUTION

The beginning point for a system of legal parentage that recognizes the

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CA-OI666-SCT, 843 So. 2d 720, 722 (Miss. 2003) (en banc) (unfair if former husband can not disestablish paternity); *In re* Estate of Tytanic, 2002 OK 100, 61 P.3d 249, 252-53 (Okla. 2002) (brother of deceased common-law husband can disestablish paternity); Shell v. Law, 935 S.W.2d 402, 410 (Tenn. Ct. App. 1996); N.P.A. v. W.B.A., 380 S.E.2d 178, 180-82 (Va. Ct. App. 1989) (rejecting common law adoption, in loco parentis, implied contract, and equitable estoppel arguments)).

135. 2002 Ga. Laws 596, § 1 (codified at GA. CODE ANN. § 19-7-54 (West 2003)).

136. Mary R. Anderlik, *Assessing the Quality of DNA-based Parentage Testing: Findings from a Survey of Laboratories*, 43 JURIMETRICS J. 291, 305-06 (2003); *see also* Mary R. Anderlik, *Disestablishment Suits*, 4 J. CENTER FOR FAMILIES, CHILD. & CTS. 3, 4-5 (2003); Dena S. Davis, *The Changing Face of "Misidentified Paternity,"* 32 J. MED. & PHIL. 359, 362 (2007) (discussing risks of genetic testing: "Adults who discover that their genetic identity is not what they believed are often extremely disrupted" (citing Peggy Orenstein, *Looking for a Donor to Call Dad*, N.Y. TIMES, June 18, 1995; Kate Hilpern, *Family: My Father, Mr. X*, THE GUARDIAN (London), Jan. 20, 2007)).

The most comprehensive study to date shows that almost always the man identified as a child's legal father is the biological father, refuting the myth that 10% or more of children are not the biological offspring of the men believed to be their fathers. The analysis concluded that in the United States, 98% of the men raising children they believe to be their biological children are correct and that only 30% of the men who seek blood tests to confirm paternity are not the biological father. Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Evidence from Worldwide Nonpaternity Rates*, 47 CURRENT ANTHROPOLOGY 513, 516 (2006).

importance of biology while leaving room for protection of functional parent-child relationships is a set of statutes that includes these possibilities. The 2002 UPA is such a code. However, for the UPA or a system like it to be widely adopted, child support law and practice should also be restructured to eliminate rules that seem unfair to men and engender resentment that manifests itself in advocacy for the view that legal parentage should turn only on biology in all circumstances.

A. The Compromise of the 2002 UPA

The 2002 UPA, like the original 1973 UPA, provides that a determination of legal parentage carries with it all the rights and duties of parenthood.[137] Under the 2002 UPA, a parent-child relationship exists between a man and a child because: 1) he was married to the child's mother and the presumption of paternity arising from marriage was not rebutted,[138] 2) because he has lived with and held out the child as his for at least two years and the resulting presumption has not been rebutted,[139] 3) because he and the mother signed and filed a formal acknowledgment of his paternity,[140] or 4) because he was adjudicated to be the father.[141] All these means of establishing paternity except the last effectively allow paternity to be established in a man who is not the biological father, since genetic testing is required only in contested paternity proceedings.[142] The marital

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137. *See* UNIF. PARENTAGE ACT § 203 (2002).

138. Under the 2002 UPA, a man married to the child's mother is presumed to be the father if the child was born while the couple was married or within 300 days of the termination of the marriage. *Id.* §§ 201(b)(1), 204(a). If the alleged marriage is void or voidable, the presumption still applies. *Id.* §§ 204(a)(3)-(4). If the couple marries after the child is born, the man is presumed to be the father only if he voluntarily took steps to establish paternity, such as filing a voluntary acknowledgment with the state, allowing his name to be on the birth certificate, or promising in writing to support the child. *Id.* § 204(a)(4).

139. *Id.* §§ 201(b)(1), 204(5). The two-year period must have begun at birth. The corresponding section of the 1973 UPA, section 4(a)(4), provided that the presumption arose upon proof that the man received the child into his home and openly held the child out as his, without time limits. UNIF. PARENTAGE ACT § 4(a)(4) (1973).

140. UNIF. PARENTAGE ACT § 201(b)(2) (2002). UPA Chapter 3 provides details for the acknowledgment procedure. If the voluntary acknowledgment signed by the mother and the man alleged to be the biological fatter is filed with the state bureau of vital statistics, it has the legal effect of a judgment of paternity. *Id.* § 305. Either party to the acknowledgment may rescind it within sixty days or before a hearing regarding the child, whichever occurs sooner. *Id.* § 307.

141. *Id.* § 201(b)(3). If a husband and wife divorce and the divorce decree identifies a child as a child of the marriage or requires the husband to pay child support, the UPA provides that the decree is a determination of paternity entitled to res judicata effect. *Id.* § 637.

Section 201(b) also provides that a man is the legal father if he has adopted the child or if he satisfies the UPA requirements for determining paternity in cases of assisted reproduction. *Id.* §§ 201(b)(4)-(6).

142. *Id.* §§ 505(b), 631(2). If a party refuses to submit to genetic testing, the court may resolve

presumption and the presumption of paternity from holding out, like their common law antecedents, recognize and protect functional parenthood. As a practical matter, the provision allowing for paternity by voluntary acknowledgment may have the same effect.[143]

While the UPA allows legal paternity to be challenged on the basis of genetic tests that show the man is not the child's biological father, it places important limits on challenges. First, any challenge must be brought within two years of the time paternity was established.[144] Second, the UPA gives the court authority to block a challenge[145] based on a finding that the party bringing the challenge is estopped to deny paternity and that it would be inequitable to disprove the father-child relationship.[146] The court's analysis must take into account the child's age, the child's relationships to the husband and the man alleged to be the genetic father, and the facts surrounding the husband's discovery of his possible nonpaternity.[147] Thus, while biological paternity is the starting point for a determination of legal paternity under the UPA, both the statute of limitations and the court's discretion to invoke estoppel and best interests principles protect functional parent-child relationships.

The website of the Commissioners on Uniform State Laws lists only eight

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the case against him or her. *Id.* § 622(b), (c). A court may enter a default order against a party who fails to appear. *Id.* § 634.

143. The UPA says that for the voluntary acknowledgment to be valid, the man must be the biological father, *id.* § 301, but genetic testing is not a prerequisite to signing the acknowledgment and lack of genetic relationship does not make the acknowledgment void. *Id.* § 302. Therefore, a voluntary acknowledgment signed by a man who is not the biological father does establish legal paternity if it is never successfully challenged. Federal law prohibits states from making genetic testing a precondition to signing a voluntary acknowledgment. 45 C.F.R. § 302.70(a)(5)(vii) (2008).

144. If the child is born to a married woman, the challenge must be brought within two years of the child's birth. UNIF. PARENTAGE ACT § 607(a). The two-year statute of limitations does not apply if the husband and wife did not cohabit or engage in sexual intercourse during the time that the child was probably conceived and if the husband never openly acknowledged the child as his. *Id.* § 607(b).

If paternity was established by voluntary acknowledgment, a party may challenge the acknowledgment only on the ground of fraud, duress, or material mistake of fact, and then for only two years after the acknowledgment was filed. *Id.* § 308(a).

Someone who was not a signatory or the acknowledgment or, if paternity was established by adjudication, who was not a party to the litigation, and who has standing to contest paternity must bring the suit within two years of the date of the acknowledgment or judgment. *Id.* § 609(b).

145. The marital presumption and the presumption arising from holding out may be rebutted only by genetic test evidence, and only court-ordered tests are admissible unless all parties agree to the admission of other test results. *Id.* § 621(c)(2). The rules regarding judicial discretion to deny a challenge to the marital presumption also apply to challenges to adjudications of paternity. *Id.* § 609(c).

146. *Id.* § 608(a).

147. *Id.* § 608(b).

states as having enacted the 2002 UPA,[148] and at least two of these have not adopted some of the provisions that protect functional parenthood. Under the Alabama and Utah versions, there is no two-year limit on challenging presumptions of paternity,[149] and the Alabama legislature did not enact the provisions giving judges discretion to exclude evidence of biological paternity based on estoppel or other equitable considerations.[150] The Oregon paternity revision work group considered recommending adoption of the UPA but did not do so in part because of the group's inability to agree to recommend these provisions.[151] Convincing most state legislatures to enact the UPA or other statutes that strike a similar balance between biology and function as bases for legal parenthood may also require modification of some current rules regarding liability for child support.

B. Modifying Child Support Rules and Practices

Some of the rules that impose child support duties on biological fathers discussed above are excellent candidates for revision, given that they place liability on people who are considered legal victims of felonies, in the case of the underage boys,[152] or who have made their wishes to avoid parenthood clearly known and have taken reasonable steps to that end, as in the contraception fraud cases.[153] These legal rules treat the males unfairly, and, in the case of boys especially, may not even produce any financial benefit for the child.[154]

Lack of financial benefit to the child also undercuts the justification for some of the more austere aspects of child support enforcement in the welfare system that threaten positive father-child relationships, as Jane Murphy explains:

> The threat of DNA testing on demand destabilizes the relationships between parents as well as those between father and child and undermines all existing policies favoring fathers' continued involvement in children's lives. In many cases, particularly those involving older

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148. Uniform Law Commissioners, A Few Facts About the Uniform Parentage Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp (last visited June 2, 2009). The states are Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. *Id.* The UPA was introduced in Colorado in 2009.

149. ALA. CODE §§ 26-17-5(b), -6 (1992 & Supp. 2008); UTAH CODE ANN. § 78B-15-607 (West 2008). In Colorado and Wyoming the statute of limitation is five years. COLO. REV. STAT. ANN. § 19-4-107(1)(b) (West 2005); WY. STAT. ANN. § 14-2-807(a) (West 2007).

150. ALA. CODE § 26-17-5; ALA. CODE § 26-17-21 (1992).

151. Harris, *A New Paternity Law*, *supra* note 3, at 317-18. The UPA is also organized differently than existing Oregon parentage statutes, and some attorney members of the work group believed that it would be preferable to retain the existing structure. *Id.* at 318.

152. *See supra* note 95 and accompanying text.

153. *See supra* note 97 and accompanying text. It should go without saying that the "sperm in the condom" fact pattern of *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579 (Ill. App. Ct. Feb. 22, 2005), should not result in the man's being liable for child support.

154. State *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273, 1279 (Kan. 1993).

> children, there is no one "waiting in the wings" to be the child's father. Vacating the paternity judgment or acknowledgment leaves the child fatherless for life, with the attendant loss of emotional support, companionship, child support, inheritance rights, and other benefits. Even where the child has already lost contact with the legal father, the child's loss is further exacerbated by finding out that the only father she has ever known does not want to be her father anymore. Many fathers who would be willing and might prefer to stay in a child's life are forced to seek disestablishment of paternity or face loss of employment, credit standing, jail, or permanent poverty.
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> Increasing the number of paternity establishments may end up having some noneconomic benefits for children but it has done little to increase the number of support orders for children on welfare. Even if more orders were obtained and more support was collected from noncustodial fathers, one widely cited study predicted that, given the poverty of this population of obligor fathers, even full payment of child support would only reduce combined spending for cash assistance, food stamps, and Medicaid by eight percent.[155]

These changes could help modify the belief that biology is all that matters when it comes to determining a child's legal parentage. In the same spirit, when courts do grant visitation with a child to an adult not biologically related on a theory of estoppel, de facto, or psychological parenthood, or standing in loco parentis, that adult should be required to contribute to the child's support. Canadian law has allowed courts to order adults standing in loco parentis to pay child support for many years without an adverse effect on adults' willingness to form relationships that include stepchildren.[156] The amount and duration of the

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155. Murphy, *supra* note 59, at 368-70 (citations omitted). Murphy proposes that mothers not be required to cooperate in establishing paternity, that rights to child support not be assigned to the state, and that processes for establishing child support orders and the guidelines that determine amounts be revised to account for the circumstances of low-income obligators. *Id.* at 370-74. Daniel Hatcher makes similar arguments in support of eliminating welfare cost recovery and requiring that mothers receiving public assistance assign child support rights to the state. Hatcher, *supra* note 7, at 1055-66; *see also* Marsha Garrison, *The Goals and Limits of Child Support, in* CHILD SUPPORT: THE NEXT FRONTIER 16, 22, 24-25 (J. Thomas Oldham & Marygold Shire Melli eds., 2000).

156. Nicholas Bala, *Who Is a 'Parent'? 'Standing in the Place of a Parent' & the Child Support Guidelines*, at 20, ssrn.com/abstract=892958 (2006). The laws of England, New Zealand, and Australia also permit the imposition of child support obligations on adults standing in loco parentis, but the duty is rarely implemented because these jurisdictions' child support guidelines do not cover this situation, and their child support enforcement agencies do not take this kind of case. *Id.* at 8 (citing Carol Rogerson, *The Child Support Obligation of Step-Parents,* 18 CAN. J. FAM. L. 9, 37-49 (2001)).

obligation of the person standing in the place of a parent could be adjusted and need not necessarily be the same as that of full legal parents.[157]

A final possible reform is to revise the law so that a child who is the legal child of the man who has lived as the father can maintain that relationship even though another man's biological paternity is legally established. Justice Brennan, dissenting in *Michael H. v. Gerald D*,[158] observed that allowing Michael to establish the fact of his biological paternity would not necessarily have required that state law strip Gerald of his parental rights.[159] The Louisiana courts accepted the invitation, developing the doctrine of dual paternity, which allows a child born to a married woman to remain the legitimate child of the mother's husband while permitting the paternity of the biological father to be established.[160] In a similar vein, the California courts have held that the presumption that an adult who lives with a child and holds out the child as his or hers is not necessarily rebutted by evidence that the adult is not the child's biological parent.[161]

CONCLUSION

In the end, the most important force for encouraging lawmakers to preserve space for the legal protection of functional parenthood may simply be awareness that both biology and function are deeply rooted and longstanding criteria for legal parentage in our culture. Legislators and judges must keep children's interests at the forefront as they develop and apply rules for determining legal parentage for the many kinds of families that exist today.

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157. *Id.* at 5.

158. 491 U.S. 110 (1989).

159. *Id.* at 154-56 (Brennan, J., dissenting).

160. Smith v. Cole, 553 So. 2d 847, 854 (La. 1989); Griffin v. Succession of Branch, 479 So. 2d 324, 326 (La. 1985); Succession of Mitchell, 323 So. 2d 451, 457 n.6 (La. 1975); Warren v. Richard, 283 So. 2d 507, 508 (La. Ct. App.), *aff'd*, 296 So. 2d 813 (La. 1974). The state supreme court left open the question of whether both fathers would have the same rights and duties. *Smith*, 553 So. 2d at 854; *see* Carbone, *supra* note 21, at 1341. When the legislature codified the doctrine, it provided that if the second father is recognized, he has all the rights and duties of fatherhood. LA. CIV. CODE ANN. art. 197 cmt. (a) (2007). The legislation is discussed in Katherine Shaw Spaht, *Who's Your Momma, Who are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307 (2007).

161. *In re* K.M. v. E.G., 117 P.3d 673, 679-81 (Cal. 2005); Elisa Maria B. v. Superior Ct., 117 P.3d 660, 669 (Cal. 2005); *In re* Jesusa V., 85 P.3d 2, 12 (Cal. 2004); Nicholas H., 46 P.3d 932, 937 (Cal. 2002). These cases are discussed in June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 3 (2007). For more on the concept of multiple parenthood, see generally Dowd, *Multiple Parents/Multiple Fathers*, *supra* note 83; Harris, *Reconsidering the Criteria*, *supra* note 12; Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309 (2007).

PERMANENCE AND PARENTHOOD: THE CASE FOR ABOLISHING THE ADOPTION ANNULMENT DOCTRINE

MARGARET M. MAHONEY*

INTRODUCTION

Most parent-child relationships are biological relationships, established by procreation. Although the state is not involved in the formation of such family relationships, the legal system immediately recognizes and assigns great significance to them. In the eyes of the law, the parent-child status is laden with rights and obligations during the child's minority and even after the child reaches adulthood.[1]

Under the family laws of every state, the parent-child relationship may also be created by adoption.[2] Such a relationship comes into existence by an order of a family court, exercising clearly articulated statutory powers.[3] Thereafter, the adoptive parent-child status involves the same legal rights and duties as the parent-child status established by procreation. For example, the Connecticut adoption statute summarizes the legal effect of adoption as follows:

> All rights, duties and other legal consequences of the biological relation of child and parent shall thereafter exist between the adopted person and the adopting parent and the relatives of such adopting parent. Such adopted person shall be treated as if such adopted person were the biological child of the adopting parent, for all purposes.[4]

As a general rule, the legal system intends the parent-child status to be permanent. Whatever the realities of the relationship between a biological or

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1. *See generally* SCOTT E. FRIEDMAN, THE LAW OF PARENT-CHILD RELATIONSHIPS (1992) (describing regulation of parent-child relationships in various legal fields); MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW (1994) (same).

2. Additional methods exist for establishing parent-child relationships in the law. *See* Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 35-36 (2003) [hereinafter Roberts, *Disestablishing Paternity*] (describing methods for establishing the paternity of children born outside of marriage); Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 55-56 (2003) [hereinafter Roberts, *Questioning Paternity*] (describing the presumption of paternity in marriage, which creates the legal status of fatherhood for the husband of a child's biological mother).

3. *See* 2 JOAN HEIFITZ HOLLINGER, ADOPTION LAW AND PRACTICE § 1.01[1], at 1-3 (2007).

4. CONN. GEN. STAT. ANN. § 45a-731(1) (West 2004); *see also* Mark F. Testa, *The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 532 (2005) ("Equating the duties of adoption with the legally binding obligations of natural parenthood is sound policy.").

adoptive parent and his or her child as it unfolds over the years, in the eyes of the law, the connection is important and lasts until the death of either party. This Article focuses on the phenomenon of parents seeking to terminate the relationship status earlier, most often before their children reach adulthood. As described at length herein, two legal doctrines govern in this area: the termination of parental rights statutes enacted in every jurisdiction and the abrogation of adoption doctrine.

The primary legal vehicle for terminating the parent-child status is the termination of parental rights statute, enacted in each state, which authorizes judicial orders terminating all of the rights and responsibilities of parenthood. These laws are designed primarily for the benefit and protection of minor children. For example, child welfare officials may seek a termination order based on a judicial determination that the parent is unfit to rear the child and that severance of the legal status would serve the child's interests.[5]

Regarding the *voluntary* termination of parental rights, these state statutes anticipate two primary circumstances in which the court may accept a parent's voluntary surrender of his or her role. First, the parent may agree to terminate his or her status in order to free a child for adoption by another adult.[6] Second, the parent may consent to end his or her legal relationship as to a child who has been adjudicated dependent or neglected within the child welfare system, whether or not adoption by another adult is planned.[7]

The termination of parental rights statutes may also be applied in other, less common situations, which are the focus of this Article. The reported cases involving parents who seek to end their legal status outside the contexts of a pending adoption or child welfare proceeding fall into a few discrete categories.

As to both biological and adoptive noncustodial parents, a common theme is the desire to be released from child support obligations.[8] In addition, the noncustodial parent may be motivated by a desire to completely sever ties with the child's custodial parent. This motivation surfaces, for example, in termination cases involving an adoptive stepparent who is subsequently divorced from the child's custodial parent.[9] Finally, noncustodial parents who have not maintained contact with their children may believe that a termination order

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5. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 9.4, at 357 (2d ed. 1988).

6. *See* 2 HOLLINGER, *supra* note 3, § 2.01[1], at 2-5 to -7.

7. *See* DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW 506-09 (2000) (discussing permanent, non-adoptive placements that may be preceded by termination of parental rights).

8. *See* Cottrell v. Cottrell, 522 S.W.2d 433, 434 (Ark. 1975) (stating that a stepfather seeking to terminate his status four years following a final adoption decree "admitted that he was trying to set aside the adoption of the child because he didn't think he should pay child support" following divorce from child's mother); *see also infra* text accompanying notes 60-66 (discussing additional cases).

9. *See* 2 HOLLINGER, *supra* note 3, § 8.02[3][b], at 8-47 to -48 (collecting cases).

would align their legal status with the parties' real relationships.[10]

Financial considerations play a less significant role in most cases where *custodial* parents seek to terminate the parent-child relationship. Exceptional cases arise, however, when parents who are overwhelmed by the expense of caring for a child with special needs seek to terminate their status.[11] Another category of cases involves custodial parents who believe that their children, for whatever reasons, have not bonded with other family members, have behaved in ways that disrupt the family, or present a danger to themselves or others.[12] Often, the custodial parents in these circumstances assert that removal of the child from the family would be the best result for all family members.[13] Recent media coverage of international adoptions involving troubled children has raised public awareness of this final category of cases.[14]

Whatever the motivations of parents who seek to terminate their status under state termination of parental rights statutes, the best interest of the child standard will govern the judicial analysis of their claims. As to adopted children, however, a second doctrinal avenue exists in many jurisdictions for the parent-initiated termination of parental rights. The doctrine of adoption abrogation or annulment empowers the courts in certain circumstances, generally unrelated to the protection and welfare of children, to enter orders setting aside earlier adoption decrees. The basic rationale for this additional termination doctrine appears in an early law review article about the abrogation doctrine: "Under the principle that what the court has created through its order, it can also put asunder, there would seem to be legal basis for setting aside adoption orders."[15]

The law of adoption annulment has two intertwined strands. The first strand, which dominates modern abrogation legislation and many judicial opinions in this field, is procedural. Namely, state rules of civil procedure generally allow for the subsequent vacation of final court orders in limited circumstances, such as where fraud or procedural irregularity tainted the initial judicial proceeding.[16] The authority of courts to set aside final orders in this manner creates an exception to the general principle of finality in civil litigation. The exception is designed to achieve the ultimate goals of fairness and justice in cases where

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10. *See, e.g.*, *In re* Jessica M., 802 A.2d 197, 199 (Conn. App. Ct. 2002) (involving petition of mother who had not seen her children for more than six years).

11. *See, e.g.*, *In re* Jurga, 472 S.E.2d 223 (N.C. Ct. App. 1996); *see also infra* notes 29-32, 52-57, and accompanying text.

12. *See* 2 HOLLINGER, *supra* note 3, § 8.02[3][a], at 8-44 to -46 (discussing adoption annulment cases involving children with behavioral issues).

13. *Id.* § 8.02[3][a], at 8-44.

14. *See, e.g.*, Cindi Lash, *More American Parents Find They Can't Cope with Troubled Russian Children*, PITTSBURGH POST-GAZETTE, Aug. 14, 2000, at A1; Pat Wingert, *When Adoption Goes Wrong*, NEWSWEEK, Dec. 17, 2007, at 58.

15. Joseph T. Helling, Note, *Adoption: Annulment of Status*, 29 NOTRE DAME LAW. 68, 69 (1953-54) (footnotes omitted).

16. *See infra* notes 189-93 and accompanying text (discussing the doctrines that authorize courts to set aside final decrees in limited circumstances).

errors affected the litigation outcome. Adoption annulment involves the application of judicial power to set aside final orders in this manner to final adoption decrees.

The second strand of the abrogation doctrine is substantive. The state statutes establish specific grounds for judicially setting aside an adoption decree, thereby terminating the legal parent-child relationship.[17] The grounds set out in the state adoption codes for this purpose have shifted significantly over the decades. Early abrogation statutes established grounds relating to the condition of the adopted child, such as the child's race, mental or physical health, or behavior.[18] With a few notable exceptions, the state legislatures have repealed these bases for adoption annulment.[19] At the same time, many state legislatures and courts have established grounds relating to problems surrounding entry of the initial adoption order, such as fraud or procedural irregularity. These grounds for annulment of the adoption order re-focus the analysis on the first strand of abrogation law, the procedural strand, which embodies the power of courts to set aside final orders in the interests of justice.[20]

This Article evaluates both strands of the doctrine of adoption annulment and concludes that neither procedural nor substantive considerations justify its continued existence. As discussed in Part V, adoption decrees differ in significant ways from the typical court order in the system of civil litigation for which judicial power to set aside the decree in appropriate cases is deemed necessary. The ultimate goal of justice in civil litigation is not furthered by allowing the adoptive parent, whose own successful petition to the court gave rise to the adoptive parent-child relationship, to subsequently challenge the propriety of that process. Additionally, as discussed in Part IV, abrogation rules establishing substantive grounds for the voluntary termination of the adoptive parental status, unrelated to the welfare of children, are inconsistent with basic family law principles. These principles include the evenhanded treatment of parent-child relationships in the law, and public policies favoring permanency in parent-child relationships except in the circumstances carefully defined in parental termination statutes. Thus, the abrogation of adoption doctrine should itself be abrogated.

Part I of this Article describes the general principle of permanence of parent-child relationships in the law and briefly focuses on formal family law programs designed to support the goal of stability. Part II focuses on the termination of parental rights statutes enacted in every state as an avenue for parents who seek to terminate their status and the operation of the best interest of the child standard in this context. Part III explains the alternative avenue for terminating parental rights, the abrogation of adoption doctrine, and explores the historical development of the doctrine, the modern statutes, and the limited role of

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17. *See infra* Part III.A (discussing evolution of the grounds for adoption annulment under state abrogation statutes).

18. *See* Helling, *supra* note 15, at 75-76.

19. *See infra* notes 115-18 and accompanying text.

20. *See infra* note 118.

considerations relating to the child's welfare. Part IV sets forth the substantive reasons for preferring termination of parental rights statutes as the exclusive avenue for legally ending parent-child relationships at the behest of the parent. Part V takes the position that the judicial adoption model does not necessitate or justify rules authorizing the judicial setting aside of final adoption decrees. There are compelling reasons to eliminate the abrogation doctrine, and no good reason for maintaining it as a means for adoptive parents to terminate legal ties to their children. Finally, the Conclusion of this Article summarizes additional recommendations associated with the proposal to abolish the adoption annulment doctrine such as enhanced family support programs, standing for all parents to file petitions under state termination of parental rights statutes, and continued application of the best interest of the child standard to resolve requests to terminate the parent-child status.

I. THE PERMANENCE OF PARENT-CHILD RELATIONSHIPS

The permanence of parent-child relationships, whether created by procreation or adoption, is an important principle in our family law system. Generally speaking, the stability that results from the maintenance of existing family ties serves the interests of children, their families, and society as a whole.[21] Family laws reflect this view about the importance of stable family relationships.[22]

Most parents share the view embodied in this legal principle about the permanency of their status.[23] Throughout history, however, there have been parents who, for a variety of reasons, prefer at some point in time to relinquish the rights and responsibilities of their status.[24] Some parents make alternative, informal arrangements for their children's care, or simply abandon them.[25] Others, however, seek a legal declaration terminating the parent-child relationship.[26] In the modern context, the primary legal vehicle for parents who

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21. *See* ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 16-20 (2004).

22. *See generally* Symposium: *The State Construction of Families: Foster Care, Termination of Parental Rights, and Adoption*, 12 VA. J. SOC. POL'Y & L. 365 (2004-05); Testa, *supra* note 4, at 499 (distinguishing the concept of legal permanence from family commitments that are not legally binding, within the child welfare system).

23. *See* ALSTOTT, *supra* note 21, at 5 ("To be sure, parents do not ordinarily perceive 'Do Not Exit' as a command from the state. Good parents provide their children with continuity of care out of love and a sense of moral obligation.").

24. *See* Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 388-99 (1996) (collecting work of family historians).

25. ALSTOTT, *supra* note 21, at 44-47 (noting that de facto abandonment of children in families is often accompanied by breakdown of the parents' relationship); Gregory A. Loken, *"Thrownaway" Children and Throwaway Parenthood*, 68 TEMP. L. REV. 1715, 1716-27 (1995); Sanger, *supra* note 24, at 390-95.

26. The number of parents who seek to legally terminate their parental status is not large, and is not clearly documented. For example, a follow-up study of 516 foster children who were adopted

wish to achieve this end is the termination of parental rights statutes enacted in every state. The doctrine of adoption abrogation is an alternative route to terminating one's parental status, available only to adoptive parents.[27]

Various public and private programs that provide assistance to families support the goals of maintaining stable parent-child relationships and avoiding child abandonment or the legal termination of parental status. The design and implementation of effective family support programs may address the concerns of parents, biological or adoptive, who might otherwise desire to terminate their status. For example, public programs designed to encourage the adoption of children in foster care provide financial support and other types of services to help sustain post-adoption relationships for this category of families.[28]

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in New York City in 1996 attempted to answer the question: "Had any adoptions been abrogated, or had adopted parents' parental rights been terminated?" Trudy Festinger, *After Adoption: Dissolution or Permanence*, 81 CHILD WELFARE 515, 526 (2002). The study revealed that nine of the children "were in placement during the study period," *id.* at 527, although the author did not clearly conclude that adoption abrogation or termination of parental rights had taken place in these cases. Festinger noted generally that "[l]ittle is known about the frequency of dissolution following legal adoption because it is so difficult to obtain accurate data." *Id.* at 517.

Another measure of the frequency of parent-initiated termination proceedings is the number of reported judicial opinions on point. As to adoption abrogation, a scholar collecting cases on this topic observed that "[t]he cases in which the [adoptive] parent has himself sought annulment . . . are few in number." T.C. Williams, Annotation, *Annulment or Vacation of Adoption Decree by Adopting Parent or Natural Parent Consenting to Adoption*, 2 A.L.R.2d 887 § 3 (1948 & Supp. 2007). As to petitions by parents under the state termination of parental rights statutes arising outside the settings of a child welfare proceeding or proposed adoption, research for this Article uncovered fewer than fifty cases on point.

27. Additional doctrines authorize the voluntary relinquishment of children by their parents. In recent years, many state legislatures have enacted so-called "safe haven" laws that allow the parents of newborns to leave them, anonymously and without any continuing responsibility, in designated locations. *See* Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 754-55 (2006). Sanger collected statutes from forty-six states, enacted within the period 1999 to 2006. *Id.* at 754 n.5. Another avenue for voluntarily relinquishing parental rights is established under state laws that permit legal fathers to "disestablish paternity," by proving the biological paternity of another man. *See generally* Roberts, *Disestablishing Paternity*, *supra* note 2 (regarding non-marital children); Roberts, *Questioning Paternity*, *supra* note 2 (regarding marital children).

Divorcing parents have, on occasion, tried to terminate the parental rights of one of them by contract or stipulation. The law confers no authority on parents to end their rights and responsibilities in this manner. *See, e.g.*, R.H. v. M.K., 603 A.2d 995, 998-99 (N.J. Super. Ct. Ch. Div. 1991) (refusing to incorporate into divorce decree the parents' agreement to terminate father's rights); *see also In re* Marriage of Jackson, 39 Cal. Rptr. 3d 365, 371-75 (Ct. App. 2006) (affirming the trial court's reversal of its earlier order granting mother's post-divorce motion, unopposed by custodial father to terminate her parental rights).

28. *See* CYNTHIA R. MABRY & LISA KELLY, ADOPTION LAW THEORY, POLICY, AND PRACTICE 728-29 (2006) (discussing post-adoption services); *see also* ALSTOTT, *supra* note 21, at 40

In the case of *In re Jurga*,[29] the North Carolina Court of Appeals described the direct connection between the limitations of a public support program and the decision of parents to file a petition under the state termination of parental rights statute. The petitioning parents in *Jurga* lost state support for their son's institutional care in North Carolina when they moved out of state. Their petition to terminate parental status was part of a plan to shift legal responsibility for their child to willing relatives who remained in North Carolina.[30] The state court of appeals ruled that the parents lacked standing under the child welfare code to seek termination of their status in these circumstances.[31] In reaching this result, the *Jurga* court acknowledged the "dilemma faced by the [parents]" who were confronted with a choice between their own relocation and the continuation of their son's care.[32]

Parent-child relationships may also be threatened in cases where parents consider their children to be impossible to live with, disruptive to the family, or a danger to themselves or others. At the most formal level, the courts that supervise child welfare and juvenile justice systems are the sources of state support for families in these circumstances.[33] Here, parents may seek support and necessary services,[34] ranging from family counseling to the placement of children outside of the family home.[35] The goal is the resolution of underlying problems, enabling the family to function and obviating the parents' inclination

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(highlighting the need for support for parents of children with disabilities, in order to avoid abandonment of children by parents).

29. 472 S.E.2d 223 (N.C. Ct. App. 1996).

30. *Id.* at 224.

31. *Id.* at 225. For a general discussion of limitations on parental standing under state termination of parental rights statutes, see *infra* text accompanying notes 49-58.

32. *In re Jurga*, 472 S.E.2d at 226.

33. In many states, courts exercise jurisdiction within the child welfare system over children who are abused or not receiving adequate care from responsible adults. *See* SARAH H. RAMSEY & DOUGLAS E. ABRAMS, CHILDREN AND THE LAW IN A NUTSHELL 1-2 (3d ed.). At the same time, the state juvenile courts traditionally have exercised jurisdiction over "delinquent" children, who commit offenses that would be criminal if committed by an adult, *see* DAVID J. HERRING, EVERYDAY LAW FOR CHILDREN 102-05 (2006) (discussing the evolution of "the juvenile court movement"), as well as children who are determined to be "in need of supervision." *See* CLARK, *supra* note 5, § 9.5, at 361; RAMSEY & ABRAMS, *supra*, at 417-18, 445-56. The latter category is often defined by statute to include minors who are truant from school, disobedient toward their parents, or generally "incorrigible." *See id.* at 418-19. In recent decades, reformers have called for the transfer of jurisdiction over such "status offenses" from the juvenile justice system to the child welfare system. *See* CLARK, *supra* note 5, § 9.5, at 361-62; RAMSEY & ABRAMS, *supra*, at 417 (describing a Pennsylvania statute, 42 PA. CONS. STAT. § 6302 (2004), which includes status offenses within the definition of child dependency under the child welfare law).

34. *See* Carol S. Stevenson et al., *The Juvenile Court: Analysis and Recommendations*, THE FUTURE OF CHILDREN, Winter 1996, at 4, 13-14 (describing parent-initiated jurisdiction of the juvenile courts in the case of "ungovernable" children).

35. *See* CLARK, *supra* note 5, § 9.5, at 365-66.

to terminate family relationships.

The connection between the remedial purposes of judicially supervised family support programs and the permanence of family relationships became clear in the Indiana case of *In re Adoption of T.B.*[36] The adoptive mother in *T.B.* first "sought the intervention of the . . . Juvenile Court[,] . . . [which] entered a preliminary order finding [her daughter] to be a child in need of services and placed [her] in a residential care facility."[37] Just weeks later, the mother "filed a petition to revoke [her daughter's] adoption in the . . . court which originally granted the adoption."[38] In spite of opposition by the department of social services, the trial court granted the annulment, on the ground of fraud in the initial adoption proceeding.[39] Notably, a threshold issue on appeal in this case questioned the jurisdiction of the adoption court to act at a time when jurisdiction in the juvenile court continued. The Indiana Supreme Court ruled that simultaneous jurisdiction was proper, but reversed the trial court's annulment decree on the merits.[40] As a result, the troubled mother-daughter relationship remained the subject of the "child in need of supervision" proceeding in the juvenile court.

Both the mother in *T.B.* and the parents in the *Jurga* case[41] sought to terminate all legal ties to their children following involvement with state support programs that did not meet their needs. These cases illustrate that in some situations, surely, enhanced support programs for families would deter parents from taking such drastic action.

The two cases discussed in this Part illustrate the two legal avenues available to parents who seek to terminate their legal status. The biological parents in *Jurga* filed a petition in family court to terminate their parental rights under the state child welfare code,[42] while the adoptive mother in *T.B.* sought an adoption annulment order in the adoption court.[43] These two avenues for terminating the parent-child status, and the differences between them, are discussed at length in the following Parts of this Article.

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36. 622 N.E.2d 921 (Ind. 1993).

37. *Id.* at 922.

38. *Id.* at 923.

39. *Id.* For a discussion of fraud as the basis for annulment claims see *infra* text accompanying notes 139-58.

40. *Id.* at 924-25. In approving the simultaneous jurisdiction of the juvenile court and the adoption court in the annulment proceeding, the Indiana Supreme Court stated: "An action for adoption and a CHINS [child in need of services] proceeding . . . are separate actions which affect different rights. The CHINS proceeding is directed at helping the child directly by assuring that the child receives necessary assistance. Adoption, on the other hand, establishes a family unit." *Id.* at 924 (citation omitted).

41. *See supra* notes 29-32 and accompanying text.

42. *In re* Jurga, 472 S.E.2d 223, 224 (N.C. Ct. App. 1996).

43. *T.B.*, 622 N.E.2d at 923.

II. TERMINATION OF PARENTAL RIGHTS STATUTES

The termination of parental rights statutes in every state provide for severance of the legal parent-child relationship by judicial order based on specific statutory standards relating to the welfare of the child. The effect of such a court order is the complete severance of legal ties. For example, the Tennessee statute provides:

> An order terminating parental rights shall have the effect of severing forever all legal rights and obligations of the parent . . . and of the child . . . . The parent . . . shall have no further right to notice of proceedings for the adoption of that child . . . and shall have no right to object to the child's adoption or thereafter to have any relationship, legal or otherwise, with the child. It shall terminate the responsibilities of that parent . . . for future child support or other future financial responsibilities even if the child is not ultimately adopted.[44]

These state laws usually operate in one of two legal contexts: child welfare and state adoption codes.

First, child welfare codes authorize various forms of state intervention in families in order to protect children, and provide for the ultimate judicial termination of children's relationships with their parents.[45] The serious step of termination in this context may occur either with the consent of the parent or involuntarily. Notably, state laws require the courts in these cases to address the future disposition of the affected child, whose well-being is the central concern of the termination order.[46]

Second, the termination of parental rights is also addressed in the state adoption codes, where the voluntary or involuntary termination of rights is a prerequisite to the adoption of children by other adults. Common fact patterns involve the surrender of newborn children, and consent by noncustodial parents to the proposed adoption of older children by their stepparents. As in the child welfare system, the best interest of the child is the governing standard in these circumstances under the state adoption codes.

The analysis in this Article focuses on efforts by parents to obtain a judicial order terminating their legal status, outside these common settings of a pending adoption or child welfare proceeding. The analysis is complicated by a lack of uniformity among the states in organizing their child welfare laws, adoption laws, and other provisions affecting children.[47] A particular state may have more than

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44. TENN. CODE ANN. § 36-1-113(*l*)(1) (West 2002).

45. *See* ABRAMS & RAMSEY, *supra* note 7, at 375-76.

46. CLARK, *supra* note 5, § 9.4, at 359.

47. Traditionally, child welfare laws and adoption laws constituted separate areas of statutory regulation. *See, e.g.*, OKLA. STAT. ANN. tit. 10, § 7006-1.1(C) (West 2007) ("The provisions of this section [dealing with termination of parental rights within the child welfare system] shall not apply to adoption proceedings and actions to terminate parental rights which do not involve a petition for deprived status of the child. Such proceedings and actions shall be governed by the Oklahoma

one statutory provision to which parents may look when they initiate the termination of their rights.[48]

A threshold question here is whether the state legislatures intended to allow parents to initiate the judicial termination of their status outside the context of a child welfare proceeding or proposed adoption. The laws in some states appear, on their face, to create such standing for parents, and have been so construed by the state courts. For example, a provision in the Texas Family Code states that "[a] parent may file a suit for termination of the petitioner's parent-child relationship. The court may order termination if termination is in the best interest of the child."[49]

Other state statutes, however, are less clear about the standing of parents to seek judicial termination of their status outside the specific context of a pending adoption or dependency adjudication. Further, some state courts have construed ambiguous adoption and child welfare codes to deny standing.

For example, in *C.J.H. v. A.K.G.*,[50] the Tennessee Court of Appeals denied standing to unmarried parents who filed a joint petition to terminate the father's status under the voluntary termination provision of the state adoption code. According to the court, "there is no statutory authority for use of these procedures outside the context of an adoption or a plan for an adoption."[51]

Adoption Code."). In recent years, certain states have implemented reforms that unify many aspects of the legal regulation of children, including the standards and procedures for terminating parental rights. *See* Barbara A. Babb & Gloria Danziger, *Introduction to Special Issue on Unified Family Courts*, 46 FAM. CT. REV. 224, 225 (2008); Andrew Schepard, *Editorial Notes*, 46 FAM. CT. REV. 217, 218-19 (2008). For example, an Indiana law titled "voluntary petition" authorizes the filing of a petition to terminate rights, upon the request of the parent, either by a "licensed child placing agency" in probate (adoption) court or by the "office of family and children" in juvenile (child welfare) court. *See* IND. CODE § 31-35-1-4 (2008).

48. *See, e.g.*, State *ex rel.* B.M.S., 2003 UT App 51, 65 P.3d 639 (Utah Ct. App. 2003) (ruling that father must proceed under a voluntary relinquishment statute containing a presumption against termination when child support was at issue, rather than another termination provision that omitted the presumption regarding parental obligations). *See generally In re* H.J.E., 359 N.W.2d 471, 474 (Iowa 1984) (disallowing on jurisdictional grounds a biological father's petition to terminate his rights under the Iowa voluntary relinquishment provision, in light of a pending proceeding under the state's involuntary termination provision).

49. TEX. FAM. CODE ANN. § 161.005(a) (Vernon 2002), *applied in* Linan v. Linan, 632 S.W.2d 155, 156 (Tex. App. 1982) (denying the petition of an adoptive, noncustodial father under the best interest of the child standard). In a recent opinion, the Texas Court of Appeals observed that "[a]lthough this provision was enacted in 1973, it has not been widely invoked." Dockery v. State, No. 03-05-00713-CV, 2006 WL 3329794, at *1 (Tex. App. Nov. 14, 2006) (footnote omitted).

50. C.J.H. v. A.K.G., No. M2001-01234-COA-R3-JV, 2002 WL 1827660, at *1 (Tenn. Ct. App. Aug. 9, 2002).

51. *Id.* at *7; *but see In re* Bruce R., 640 A.2d 643, 645 (Conn. App. Ct. 1994) (rejecting mother's argument that a voluntary termination provision in the state adoption code, currently codified at CONN. GEN. STAT. ANN. § 45-a-715(a) (West 2004), "was 'not conceived' to allow a

Parental standing has also been denied in some cases when parents proceeded under the voluntary termination provision of the state child welfare code. For example, in *In re Jurga*,[52] discussed in Part I,[53] the North Carolina Court of Appeals denied standing to biological parents who sought to terminate their rights as part of a plan to assure ongoing institutional care for their minor son after they moved out of state.[54] The court ruled that the termination provision of the child welfare code established "'the *exclusive* judicial procedure to be used in termination of parental rights cases,'"[55] and that "it expressly limits the persons and agencies who may petition for termination, and in no wise includes natural parents jointly seeking termination of their *own* parental rights."[56] Although the court expressed sympathy for the parents and their goals in this case, their sympathetic circumstances did not change the result. According to the court, "[w]hile not insensitive to [the child's] circumstance and the dilemma faced by the [parents], we must follow established law."[57]

The denial of access to the courts in this manner precludes parent-initiated severance even in cases where the court might determine on the merits that the child's interest would be served by such a result. The better legal model, illustrated by the rest of the cases discussed in the remainder of this Part and the Texas statute quoted above,[58] authorizes parent petitions to terminate their rights subject to strict substantive standards that protect the interests of children.

Most courts ruling on parental requests for the termination of all ties to their children assert a strong presumption that children's interests are *not* served by removing a parent from the legal picture, at least where no dependency adjudication has been made and no adoption by another adult is pending. In many cases, the potential loss of financial support for the child is a crucial consideration. For example, the Utah termination statute creates "a presumption that voluntary relinquishment or consent for termination of parental rights is not in the child's best interest where it appears to the court that the primary purpose

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parent to seek and receive a termination of his or her own parental rights 'absent pending adoption [or] state custodial placement'") (quoting statement of mother), *aff'd*, 662 A.2d 107 (Conn. 1995).

52. 472 S.E.2d 223 (N.C. Ct. App. 1996).

53. *See supra* notes 29-32 and accompanying text.

54. 472 S.E.2d at 226.

55. *Id.* at 225 (quoting *In re* Curtis, 410 S.E.2d 917, 919 (N.C. Ct. App. 1991)).

56. *Id.* at 226 (citation omitted).

57. *Id.*; *see also In re* K.L.S., 350 S.E.2d 50, 51 (Ga. Ct. App. 1986) (ruling that the term "written consent of the parent" in the termination provision of the child welfare code anticipated consent to the proposal of another party, usually the state, and did not authorize "petitions by parents seeking judicial imprimatur of their own, voluntary abandonment of parental responsibility"); *In re* B.L.G., 731 S.W.2d 492, 499 (Mo. Ct. App. 1987) (stating that under termination statute requiring all petitions to be filed by a juvenile officer, "the juvenile officer who files the petition must act in a role beyond that of a mere tool of a parent whose primary motivation is that of avoiding parental responsibilities").

58. *See* TEX. FAM. CODE ANN. § 161.005(a) (Vernon 2002); *supra* note 49 and accompanying text.

is to avoid a financial support obligation."[59]

The financial support factor was determinative in the case of *Ex parte Brooks*,[60] when the Alabama Supreme Court denied the joint petition of divorced parents to terminate the noncustodial father's parental rights. In *Brooks*, the child's parents had divorced during the mother's pregnancy, "mainly because [the mother] would not agree to her husband's insistence that she have an abortion."[61] During the next four years, the father did not provide financial support to, or communicate with, his son. The parents' petition to terminate the father's status under the Alabama Child Protection Act was supported by a court-appointed social worker but opposed by the child's guardian ad litem.[62] In filing the petition, the mother expressed concern that the father might interfere with her sole custodial authority sometime in the future, and the father clearly wished to be free of any future obligation to the child.[63]

After the trial court in *Brooks* denied the parents' termination petition, the intermediate appellate court reversed, ruling that a termination order would serve the best interests of the child.[64] Finally, the Alabama Supreme Court reinstated the trial court order, stating that the child welfare code authorized termination only "[w]hen a child's welfare is threatened by continuation of parental rights" and "was not intended as a means for allowing a parent to . . . avoid his obligation to support the child."[65] As to the mother's concern about possible custodial interference by the father, which might harm the child in the future, the court noted the absence of any such conduct to date and the availability of remedies, including the ultimate termination of parental rights, if problems arose

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59. UTAH CODE ANN. § 78-3a-414(6) (West 2004 & Supp. 2008) (current version at UTAH CODE ANN. § 79A-6-514 (West Supp. 2008)), *applied in* State *ex rel.* B.M.S., 2003 UT App 51, 65 P.3d 639 (Utah Ct. App. 2003).

60. 513 So. 2d 614 (Ala. 1987), *overruled by Ex Parte* Beasley, 564 So. 2d 950 (Ala. 1990).

61. *Id.* at 615.

62. *Id.* at 616.

63. *Id.*

64. The opinion of the intermediate appellate court appears at *In re Stephenson*, 513 So. 2d 612, 614 (Ala. Civ. App. 1986), *overruled sub nom. Ex Parte* Brooks, 513 So. 2d 614 (Ala. 1987).

65. *Brooks*, 513 So. 2d at 617; *see also In re* Jessica M., 802 A.2d 197, 206 (Conn. App. Ct. 2002) (reversing probate court decision that granted voluntary termination petition of mother who had not seen her children for more than six years); *In re* Bruce R., 640 A.2d 643, 647-48 (Conn. App. Ct. 1994) (reversing trial court decision to grant father's termination petition, and remanding for full consideration of financial issues), *aff'd*, 662 A.2d 107 (Conn. 1995); Dockery v. State, No. 03-05-00713-CV, 2006 WL 3329794, at *3 (Tex. App. Nov. 14, 2006) (disallowing voluntary termination petition of father who owed child support arrearages to his adult, nineteen-year-old son, because father "provided no evidence that termination was in the child's best interest"); Linan v. Linan 632 S.W.2d 155, 156 (Tex. App. 1982) (denying voluntary termination petition filed by noncustodial, adoptive father two years following his divorce from the child's adoptive mother); State *ex rel.* R.N.J., 908 P.2d 345, 351 (Utah Ct. App. 1995) ("Only in the most aggravated and difficult cases do the best interests *of the child* call for the court to relieve a living, capable, and solvent parent of the obligation to support the parent's child.").

in the future.[66]

Quite clearly, on the facts of the *Brooks* case, the state termination statute could have been used *against* the father in an involuntary termination proceeding initiated in a different context, such as a stepfather adoption proceeding. The fact that the father's past behavior constituted grounds for termination (most likely abandonment) in such a proceeding did not, however, enhance the parents' claim in the voluntary termination proceeding.[67]

The courts in other states have assigned even greater weight to the issue of financial support. Thus, in a case involving a divorced, adoptive stepfather, the Minnesota Court of Appeals ruled that noncustodial parents generally have *no standing* to seek to terminate their status unless adoption by another adult is pending.[68] According to the court, "the best interests of a child are not served by permitting a noncustodial parent to terminate parental rights voluntarily unless that termination is accomplished to facilitate adoption of the child. Adoption assures that the child will not lose valuable rights to support."[69]

There are fewer reported cases involving *custodial* parents who initiate termination of their status outside the context of a child welfare proceeding or pending adoption. Often, these cases involve children who present special demands or challenges that their parents feel unable to meet. For example, the parents in *In re Welfare of D.C.M.*[70] adopted a twelve-year-old child who had been diagnosed with emotional and behavioral problems. One year after the adoption was final, the parents successfully petitioned to terminate their rights, because they were "unable to cope with D.C.M.'s problems and the way his behavior affected their family."[71]

The termination statute in Minnesota, applied in the *D.C.M.* case, included two prongs: first, "[t]he juvenile court may upon petition, terminate all rights of a parent to a child . . . with the written consent of a parent who for good cause desires to terminate parental rights";[72] and, second, "the best interests of the child must be the paramount consideration, provided that the conditions [relating to good cause] are found by the court."[73] The juvenile court in *D.C.M.* applied this statute and granted the parents' petition. On appeal by the county, the court of

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66. *Brooks*, 513 So. 2d at 617.

67. *See In re* T.M.C., 52 P.3d 934, 937 (Nev. 2002) ("Even if the parent engages in conduct that satisfies the parental fault provisions of [the child welfare code], the child's best interests must be served by the termination of parental rights for such termination to be appropriate. Here, [the father's] contention that the child would be better off without him and his continued financial support is unpersuasive.").

68. *In re* Welfare of J.D.N., 504 N.W.2d 54, 57 (Minn. Ct. App. 1993).

69. *Id.* at 58; *see also* Cartwright v. Cartwright, 635 S.E.2d 691, 693 (Va. Ct. App. 2006) (denying standing to noncustodial parents under the provision of the state child welfare code that permits voluntary termination petitions by parents).

70. 443 N.W.2d 853 (Minn. Ct. App. 1989).

71. *Id.* at 854.

72. MINN. STAT. ANN. § 260C.301(1)(a) (West 2007).

73. *Id.* § 260C.301(7).

appeals affirmed, ruling that evidence of the child's disruptive behavior satisfied the statutory "good cause" requirement.[74] As to the requisite best interests of the child analysis, the appellate court highlighted the testimony of professionals who favored termination and observed that "[t]he [parents'] rejection of [the child] appears complete and . . . [s]ubjecting [the child] to additional reunification counseling is not in his best interests."[75]

The number of reported cases involving petitions filed by parents pursuant to state termination of parental rights statutes, outside the setting of a child welfare proceeding or pending adoption, is small. However, the stakes in each case, for the family and society, are very high. Termination laws presume a strong correlation between permanence in established parent-child relationships, whether biological or adoptive, and the best interests of the child. As illustrated by the case of *D.C.M.*, the state statutes that confer standing on parents enable them to disprove this correlation and terminate their legal status. As in *D.C.M.*, a termination order will be entered based on the court's assessment that this result is best for the child.

III. Abrogation of Adoption Statutes

The laws of most states provide an alternative legal avenue for adoptive parents who seek to terminate legal ties to their children. The doctrine of adoption annulment or abrogation involves the judicial setting aside of a final adoption order, which created the parent-child status, upon petition of the adoptive parent.[76] Unlike the provisions of the termination of parental rights statutes, the standards expressed in most of the state abrogation laws do not focus on the welfare of the adopted child whose ongoing status is the subject of the parent-initiated proceeding. This failure renders the abrogation doctrine unacceptable as a legal basis for terminating parent-child relationships.

A. The History of Adoption Abrogation Laws

Adoption statutes in every state authorize the establishment by court order of the legally significant parent-child status between an adoptive parent and child. It is often said that adoption is a creature of statute, because common law courts did not assume the power to create new family relationships in this manner

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74. *D.C.M.*, 443 N.W.2d at 854-55.

75. *Id.* at 855. A dissenting judge opined that this analysis and result failed to place "paramount" importance on the best interests consideration, as required by the state statute, focused instead on "lessening the [parents'] burdens" under the good cause portion of the statute. *Id.* (Nierengarten, J., dissenting).

76. Adoptive placements may also be interrupted during the period prior to entry of a final adoption decree. This circumstance, sometimes called "disrupted adoption," *see* D. Kelly Weisberg & Susan Frelich Appleton, Modern Family Law 1209 n.2 (2d ed. 2002), or "failed adoption," *see* Celia Bass, *Matchmaker-Matchmaker: Older-Child Adoption Failures*, 54 Child Welfare 505, 506-07 (1975), is beyond the scope of this Article.

prior to the authorizing legislation in each state.[77] The adoption statutes were relatively late additions to state family codes, with the first enactments taking place in the mid-nineteenth century.[78]

For example, in the case of *Buttrey v. West*,[79] decided in 1924, the Supreme Court of Alabama summarized the historical development of the state's adoption laws prior to that date. According to the *Buttrey* court, the first Alabama adoption statute was enacted in 1852 to supplement the more limited common law in loco parentis doctrine as a means for establishing legal ties between biologically unrelated adults and children.[80] Under the statute, "the adoption of a child . . . accompanied by taking the child into the family, create[d] the status of parent and child, with the duty of care, maintenance, training, and education, along with the right to the custody, control, and services of the child."[81]

The judicial authority to *set aside* an adoption order is similarly conferred by statute in most states, although some courts assumed nonstatutory authority for this purpose once their basic authority to enter adoption orders was established by statute.[82] Thus, the Alabama Supreme Court in *Buttrey* observed that the first annulment provision in Alabama, enacted in 1897, established judicial authority to annul an adoption "for good cause shown" and on "petition of [the] child, or the party adopting the child."[83]

The grounds for annulling an adoption during this early phase of regulation focused primarily on the post-adoption condition of the child. A law review note published in 1953, by Joseph Helling, provides a summary of the early laws,[84] noting that "[t]he vast majority of jurisdictions [had] adopted the view, either by statute or decision, that an adoption order can be annulled."[85] As to the grounds for annulment, eight state laws included the physical or mental disability of the

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77. *See* CLARK, *supra* note 5, § 20.1, at 851.

78. *See id.*; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 211-12 (2d ed. 1985).

79. 102 So. 456 (Ala. 1924).

80. *Id.* at 457-58.

81. *Id.* at 458.

82. Nonstatutory authority to annul adoption decrees in this manner is typically premised on general rules governing civil litigation, which allow for the vacation of final court orders in certain circumstances. *See infra* notes 189-93 and accompanying text.

83. 102 So. at 458. The standing of the child to petition for adoption annulment, a feature of early annulment statutes, including the Alabama law quoted in the text, does not continue in modern abrogation doctrine. Additionally, some early laws included grounds relating to mistreatment of the child by the adoptive parents. *See* Williams, *supra* note 26, § 8[b] (discussing New York abrogation statute that allowed an annulment petition by the child or the child's representative based on the adoptive parent's "cruelty, . . . misusage, . . . refusal to support, . . . attempt to change . . . the religion of the child[,] or . . . any other violation of duty"). In the modern context, parental misconduct may be the basis for the termination of parental rights by the state under the child welfare laws discussed in Part II of this Article.

84. *See* Helling, *supra* note 15, at 68.

85. *Id.* at 69; *see also id.* at 70 n.9 (collecting the state abrogation statutes).

child,[86] two states included "discovery . . . that the racial ancestry of the child is different than that of the adopting parents,"[87] and the New York statute established "misconduct or wilful desertion by the child" as a ground for adoption annulment.[88]

Other state annulment statutes, including the Alabama law quoted above, contained the more general ground of "good cause,"[89] which could be construed broadly to include the same types of child-related conditions and circumstances. For example, the Supreme Court of Alabama in *Buttrey v. West*[90] made the following statement about the state's "good cause" standard: "[T]he [adoptive] parent has rights as well as duties . . . [and] [i]f these ends are defeated, without fault of the [adoptive] parent, by misfortune, . . . or by perversity or ingratitude of the child . . . , the statute opens the door [to annulment]."[91] It appears that the court here was anticipating the more specific circumstances, such as illness or misconduct of the child, that appeared in other statutes of this era. These grounds for annulment enabled the adoptive parent to petition the court for termination in circumstances where the parent-child relationship proved to be difficult or contrary to the parent's expectation.

Notably, the time limits for filing petitions under many early abrogation statutes were very lengthy or nonexistent. According to the 1953 summary of adoption laws, the "good cause" provisions generally involved no limitation whatsoever.[92] For example, the Alabama court in *Buttrey* considered the father's (unsuccessful) claim to set aside his twelve-year-old daughter's adoption ten years after the adoption became final.[93] As to the disability and race-based grounds for adoption abrogation, a five-year statute of limitations was the norm.[94]

Besides the child-related grounds, the first generation of adoption annulment laws sometimes included grounds, such as fraud, duress, or procedural irregularity in the initial judicial proceeding, as a basis for vacating a final judgment under the state's general rules of civil procedure.[95] According to the 1953 law review note, these grounds for annulment were often established by the courts themselves rather than the legislatures, and often involved no time limit.[96]

By the 1980s, most state legislatures had significantly revised their adoption abrogation laws. According to Anne Howard, the author of another law review note, published in 1983, almost all of the state legislatures by then had repealed the substantive grounds for annulment relating to the condition of the adopted

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86. *Id.* at 75-76.
87. *Id.* at 76.
88. *Id.*
89. *Id.* at 75 (citing seven "good cause" statutes).
90. 102 So. 456 (Ala. 1924).
91. *Id.* at 459.
92. Helling, *supra* note 15, at 75.
93. *Buttrey*, 102 So. at 457-58.
94. *See* Helling, *supra* note 15, at 75-76.
95. *Id.* at 76.
96. *Id.* at 71-76.

child.[97] Thus, only "[r]emnants of each of these grounds [could] be found in various state statutes."[98] Specifically, only one state (Kentucky) retained racial differences as a ground for annulment,[99] a provision that remains to this day in the Kentucky statute.[100] Similarly, in 1983 only one state, California, retained (and retains to the present day)[101] a ground relating to the child's health.[102] The final remnant of the traditional grounds appearing in current abrogation laws is the "good cause" provision retained in the Hawaii adoption statute.[103]

By 1983 many of the state legislatures had either replaced the traditional child-related grounds with, or retained standards in the annulment statutes relating to, problems in the entry of initial adoption decrees, such as fraud and procedural irregularities.[104] The reformers had also addressed the issue of time limitations on annulment petitions, by adding statutes of limitation for the first time or reducing the time available for filing a petition.[105] These substantive and procedural changes marked the beginning of the modern era of abrogation law.

The relevant provisions of the Uniform Adoption Act (UAA), revised twice since its first promulgation in 1953, illustrate this evolution in abrogation doctrine. The original UAA annulment provision allowed an adoption to be set aside if "a child develop[ed] any serious and permanent physical or mental malady or incapacity as a result of conditions existing prior to the adoption and of which the adopting parents had no knowledge or notice."[106] Next, the updated annulment section in the UAA of 1969 provided:

> [U]pon the expiration of [one] year after an adoption decree is issued the decree cannot be questioned by any person including the [adoptive parent], in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of

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97. Anne Harlan Howard, Note, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. FAM. L. 549, 554 (1983-84).

98. *Id.*

99. *Id.* at 556.

100. *See* KY. REV. STAT. ANN. § 199.540(1) (West 2006); *see also infra* notes 123-24 and accompanying text.

101. *See* CAL. FAM. CODE § 9100(a) (West 2004); *see also infra* notes 125-35 and accompanying text.

102. *See* Howard, *supra* note 97, at 554-56. Similar health-related abrogation statutes were repealed in Missouri in 1982, *id.* at 554, New York in 1974, Elizabeth N. Carroll, *Abrogation of Adoption by Adoptive Parents*, 19 FAM. L.Q. 155, 171 n.122 (1985), and Utah in 1975, *id.*

103. *See* HAW. REV. STAT. ANN. § 578-12 (LexisNexis 2005). As to the misconduct of the child, the traditional ground discussed earlier in the text, New York's repeal of this ground in 1974 removed it completely from annulment doctrine nationwide. *See* Howard, *supra* note 97, at 557 n.41.

104. Howard, *supra* note 97, at 554.

105. *Id.* at 560-61.

106. *Id.* at 553 (quoting UNIF. ADOPTION ACT (1953), Historical Note, 9 U.L.A. 11 (1979)).

jurisdiction of the parties or of the subject matter.[107]

This version shifted the substantive focus from concerns relating to the condition of the child to procedural irregularities in the initial adoption proceeding, and added a one-year time limit on all annulment actions. The current annulment provision, introduced as part of the UAA of 1994, simply states that "[a] decree of adoption . . . is not subject to a challenge begun more than six months after the decree . . . is issued,"[108] thus further restricting the time period for setting aside final adoption orders.

Howard provided the following explanation for these legislative trends: "Over time, statutes have become more restrictive as to . . . grounds . . . and . . . the time in which an action may be filed. . . . [T]he overall implication of such a statutory survey is widespread recognition of the necessity of finalizing the familial status created by an adoption decree."[109] The same goal of finalizing adoptive relationships was emphasized in the legislative commentary when the Alabama legislature, which had earlier enacted the broadly-construed "good cause" provision discussed earlier, reformed the state annulment statute.[110] The Alabama drafters stated: "[I]t is imperative that the adoptee be assured a secure and stable environment without an untimely and unfounded interruption."[111]

This commentary accurately notes that the abrogation doctrine threatens the stability of family relationships. The legal reforms of the late twentieth century moved toward the goal of family stability by placing important limitations on the substantive and procedural scope of state abrogation laws. Even in their modern form, however, adoption annulment laws continue to fall short of the Alabama legislature's goal, "that the adoptee be assured a secure and stable environment without an untimely and unfounded interruption."[112]

B. Current Abrogation Statutes

Currently, the adoption codes in approximately two-thirds of the states include judicial annulment provisions, which permit designated persons, including the adoptive parents,[113] to petition to set aside a final adoption

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107. UNIF. ADOPTION ACT § 15(b) (1969), 9 U.L.A. 203 (1999).

108. UNIF. ADOPTION ACT § 3-707(d) (1994), 9 U.L.A. 98 (1999). The current provision includes additional limitations on the possible claims of *biological* parents seeking to set aside the final decree of adoption. *See id.* §§ (b), (d).

109. Howard, *supra* note 97, at 563.

110. *See supra* notes 90-91 and accompanying text (discussing the broad construction of the statutory "good cause" provision in the case of Buttrey v. West, 102 So. 456 (Ala. 1924)).

111. ALA. CODE § 26-10A-25 cmt. (1992). This commentary accompanied the enactment of the current Alabama annulment law, which provides that "[a] final decree of adoption may not be collaterally attacked, except in cases of fraud or where the adoptee has been kidnapped, after the expiration of one year from the entry of the final decree and after all appeals, if any." *Id.* § 26-10A-25(d).

112. *Id.* § 26-10A-25 cmt.

113. State adoption abrogation laws confer standing on persons other than the adoptive

decree.[114] Only three states retain traditional grounds for adoption annulment relating to the condition of the child: Kentucky (race),[115] California (disability of child)[116] and Hawaii (good cause).[117] The remainder of the current state statutes focus on matters that are also the basis for setting aside final court orders under general rules of civil procedure, such as fraud or procedural irregularities in the initial adoption proceeding.[118]

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parents. For example, annulment of a final adoption order may be sought by the biological parent claiming fraud or process violations in the initial adoption proceeding. *See* 2 HOLLINGER, *supra* note 3, §§ 8.02[1] to -[2], at 8-11 to -43. In the past, abrogation laws also conferred standing on an additional category of petitioners, namely, heirs of the adoptive parent who sought to destroy the status of the adopted child at the time of the adoptive parent's death. *See* Williams, *supra* note 26, §§ 8[a]-[b] (collecting cases).

114. ALA. CODE § 26-10A-25(d) (1992); ALASKA STAT. § 25.23.140(b) (2008); ARIZ. REV. STAT. ANN. § 8-123 (2007); ARK. CODE ANN. § 9-9-216(b) (West 2004); CAL. FAM. CODE § 9100 (West 2004); COLO. REV. STAT. ANN. § 19-5-214 (West 2005); CONN. GEN. STAT. ANN. § 45a-24 (West 2004); DEL. CODE ANN. tit. 13, § 918 (West 2006); D.C. CODE § 16-310 (2001); FLA. STAT. ANN. § 63.182 (West 2005 & Supp. 2009); HAW. REV. STAT. ANN. § 578-12 (LexisNexis 2005); IDAHO CODE ANN. § 16-1509A (West 2006); 750 ILL. COMP. STAT. ANN. 50/20b (West 1999); 750 ILL. COMP. STAT. ANN. 55/1 (West 1999); KY. REV. STAT. ANN. § 199.540 (West 2006); LA. CHILD. CODE ANN. art. 1262 (2004); MISS. CODE ANN. § 93-17-15 (West 2007); MISS. CODE ANN. § 93-17-17 (West 2007); MO. ANN. STAT. § 453.140 (West 2003); NEB. REV. STAT. § 43-116 (2004); N.H. REV. STAT. ANN. § 170-B:21(II) (Supp. 2008); N.M. STAT. ANN. § 32A-5-36(K) (West 2003); N.Y. DOM. REL. LAW § 114(3) (McKinney 1999); N.C. GEN. STAT. ANN. § 48-2-607(a), (c) (West 2000); N.D. CENT. CODE § 14-15-15 (2004); OHIO REV. CODE ANN. § 3107.16 (West 2005); OKLA. STAT. ANN. tit. 10, § 7505-7.2 (West 2007); OR. REV. STAT. ANN. § 109.381 (West 2003 & Supp. 2008); S.C. CODE ANN. § 20-7-1800 (1985 & Supp. 2008); S.D. CODIFIED LAWS § 25-6-21 (2004); TENN. CODE ANN. § 36-1-122(b) (West 2002); VA. CODE ANN. § 63.2-1216 (2007).

115. *See* KY. REV. STAT. ANN. § 199.540(1) (West 2006).

116. *See* CAL. FAM. CODE § 9100(a) (West 2004).

117. *See* HAW. REV. STAT. ANN. § 578-12 (LexisNexis 2005).

118. In addition to the laws discussed in the text, several states have also enacted provisions about the amendment of public records, especially birth certificates, upon the adoption of any person in the state or the annulment of an adoption. *See* GA. CODE ANN. § 31-10-13(c) (West 2003 & Supp. 2008); IDAHO CODE ANN. § 39-258(a) (West 2006); 410 ILL. COMP. STAT. ANN. 535/16(2), (3) (West 2005); IND. CODE §§ 31-19-12-1; 31-19-13-3 (2008); IOWA CODE ANN. § 144.21 (West 2005); ME. REV. STAT. ANN. tit. 22, § 2765(3) (2004 & Supp. 2008); TEX. HEALTH & SAFETY CODE ANN. § 192.009 (Vernon 2001 & Supp. 2008); UTAH CODE ANN. § 26-2-25 (West 2004); WYO. STAT. ANN. § 35-1-416 (West 2007). In some of these states, the record-keeping provisions are the only current provisions addressing the topic of adoption annulment.

These record-keeping provisions typically appear in a regulatory compilation dealing with public records, rather than the state family code. Many states adopted for this purpose the provisions of the Model State Vital Statistics Act and Regulation §§ 11-12 (1992), which was promulgated several decades ago by the U.S. Department of Health, Education and Welfare, predecessor to the U.S. Department of Health and Human Services. A prior version of the Act and Regulations dated 1977 is available. *See* Model State Vital Statistics Act and Regulations (1997),

The Hawaii annulment provision authorizes the adoption court to set aside an adoption decree within one year of its entry "for good cause."[119] There are no reported cases construing the phrase "for good cause" under this statute. In the past, as illustrated by the opinion of the Alabama Supreme Court in *Buttrey v. West*,[120] the same "good cause" language was construed to include many traditional, child-related grounds for abrogation, such as "perversity or ingratitude of the child."[121] A modern court might construe this standard differently, in a manner consistent with the majority of current abrogation statutes that focus on matters arising from errors made in the original adoption proceeding.[122]

No similar ambiguity surrounds the abrogation statutes in Kentucky and California, which also retain traditional grounds for adoption annulment. Although all other states have removed race-based grounds from their statutes, the current Kentucky law still allows an adoption to be annulled within five years of the final decree "[i]f a child . . . reveals definite traits of ethnological ancestry different from those of the adoptive parents, and of which the adoptive parents had no knowledge or information prior to the adoption."[123] There is no case law in Kentucky applying this statutory provision. In the modern context, the prospect of a parent relying upon his or her child's "ethnological ancestry" to terminate their relationship is repugnant, and the Kentucky law is predictably unconstitutional under the Equal Protection Clause.[124]

The traditional ground for adoption annulment retained in the California adoption code refers to disability of the adopted child. The current statute provides:

If [an adopted] child . . . shows evidence of a developmental disability

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available at http://www.cdc.gov/nchs/data/misc/mvsact77acc.pdf.

119. HAW. REV. STAT. ANN. § 578-12 (LexisNexis 2005). The same provision authorizes suit for annulment in the adoption court based on fraud without any limitation on time to sue, and denies the availability of annulment decrees in any collateral proceeding. *Id.*

120. Buttrey v. West, 102 So. 456 (Ala. 1924) (construing the Alabama statute that provided for abrogation based on good cause, which was repealed in 1931); *see also supra* notes 90-91 and accompanying text.

121. *Buttrey*, 102 So. at 459.

122. *See* Carroll, *supra* note 102, at 172-73 ("Although there is no current case law . . . defining 'good cause shown,' [this statutory standard] could be interpreted like . . . statutes which treat abrogation of adoption the same as revocation of other civil matters.").

123. KY. REV. STAT. ANN. § 199.540(1) (West 2006). The statute also provides for the annulment of adoption orders based on procedural defects, subject to a one year time limitation. *Id.* § 199.540(2).

124. *See generally* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.5, at 423-26 (4th ed. 2008) (summarizing general ban under the Fourteenth Amendment on state action that discriminates against individuals based on their race); MABRY & KELLY, *supra* note 28, ch. 7 (discussing changing attitudes and rules regarding consideration of race in the placement of adopted children).

> or mental illness as a result of conditions existing before the adoption to an extent that the child . . . is considered unadoptable, and . . . the adoptive parents or parent had no knowledge or notice before the entry of the order of adoption, . . . the court . . . may make an order setting aside the order of adoption.[125]

There is a five year time limit on the adoptive parent's right to file a petition for annulment under this provision.[126]

In the 1991 case of *Adoption of Kay C.*,[127] the California Court of Appeals explained the legislative policy underlying this adoption annulment provision. In *Kay C.*, the court analogized the ground of mental disability to the general grounds established by state law for vacating any final court order, such as fraud, mistake and undue influence. Thus, the disability ground for vacating adoption decrees was described as the "legislatively perceived equivalent of mistake—the adopting parents' lack of knowledge or notice of a serious condition predating the adoption which, if known, would have affected their agreement to adopt."[128]

In two cases decided in 2002, the California Courts of Appeal applied the standard for adoption annulment established in *Kay C.*, requiring a "mistake" based on lack of informed consent by the adoptive parents.[129] The facts of these two cases were similar in significant ways, but the two trial courts, affirmed on appeal, reached different results. The parents in both cases knew that their children had experienced many difficulties prior to being adopted. In both, the first diagnosis of mental illness came *after* the adoptions were final. The court of appeals in *In re Adoption of Nicole O.*[130] relied upon the fact that the parents "had no knowledge of [their daughter's] mental illness when they adopted

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125. CAL. FAM. CODE § 9100(a) (West 2004). A disability-based ground for adoption abrogation was first enacted in California in 1937. *See In re* Adoption of Katherine A. Anderson, 185 Cal. Rptr. 101, 103 (Ct. App. 1982). In 1993, the legislature replaced the earlier requirement of "evidence of being feeble-minded, epileptic or insane," CAL. CIV. CODE § 227b (West 2007) (repealed 1973), with the current standard of "developmental disability or mental illness."

126. *See* CAL. FAM. CODE § 9100(b). An additional provision in the California abrogation law establishes a three-year statute of limitations for "[a]n action . . . to vacate . . . an order of adoption, based on fraud." *Id.* § 9102(b). A one-year limit was established for "[a]n action . . . to vacate . . . an order of adoption on any ground, except fraud." *Id.* § 9102(a). The apparent contradiction between the five-year time limit in the disability provision quoted in the text and the one-year limitation for proceedings based on "any ground, except fraud" was resolved by the state court of appeals in favor of the lengthier time limit under the more specific disability provision. *See In re* Adoption of Nicole O., No. G028897, 2002 WL 453619, at *4 (Cal. Ct. App. 2002) (affirming decision to grant annulment petition filed four and one-half years after entry of final adoption decree).

127. 278 Cal. Rptr. 907 (Ct. App. 1991).

128. *Id.* at 913.

129. *Id.*

130. No. G028897, 2002 WL 453619 (Cal. Ct. App. Mar. 25, 2002).

her,"[131] in finding the requisite lack of informed consent under the *Kay C.* standard. By way of contrast, in *In re Adoption of K.G.*,[132] decided just a few months later in another division of the state court of appeals, the court ruled that knowledge of the child's troubled history at the time of adoption prevented the adoptive mother from meeting the "lack of informed consent" standard.[133] A notable difference between the two cases involved the absence of any party opposed to the parents' annulment petition in the trial court proceeding in the *Nicole O.* case,[134] whereas the Department of Social Services opposed the annulment petition in the *K.G.* case.[135]

Results aside, the California courts in both of these cases applied the disability ground under the state abrogation statute in a straightforward manner, in deciding whether to grant the adoptive parents' requests for annulment. Neither court expressly considered the welfare of the children in deciding whether to sever legal ties with their parents. Rather, the focus of the analysis under the California statute was on the adults who had changed their minds about parenthood.

Except for the abrogation provisions in Hawaii, Kentucky, and California, the grounds for annulment in modern state adoption statutes address matters that also arise under state-wide rules governing the vacation of civil court orders. The most common are procedural defects, such as the failure to provide notice of an adoption proceeding to the biological parent, and fraud. For example, the Alaska annulment statute provides:

> [U]pon the expiration of one year after an adoption decree is issued, the decree may not be questioned by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter.[136]

Like the old-fashioned grounds retained in Hawaii, Kentucky, and California, the grounds for adoption annulment specified in this Alaska provision do not focus on the welfare of the adopted child. Rather, they highlight the interests of adult parties and the integrity of the judicial system.

Grounds for annulment that involve strictly procedural defects in the initial adoption proceeding are most likely to be invoked by the biological parents of the adopted children, whose rights may have been terminated without adequate

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131. *Id.* at *1.

132. No. F039272, 2002 WL 31677027 (Cal. Ct. App. Nov. 26, 2002).

133. *Id.* at *2-3.

134. In the annulment proceeding in *Nicole O.*, the child had been represented by the Department of Social Services, which recommended annulment. The child initiated the appeal from the trial court's annulment order after she obtained private legal representation. Her claim of ineffective representation in the annulment proceeding was rejected by the court of appeals. 2002 WL 453619, at *6.

135. *See* 2002 WL 31677027, at *1 (identifying the Department of Social Services as a party).

136. ALASKA STAT. § 25.23.140 (2008).

procedural safeguards.[137] The interests of biological parents in these circumstances may be vindicated under state annulment statutes as well as provisions of the Constitution limiting state interference with parental rights.[138] By way of contrast, adoptive parents who were the successful petitioners in the initial adoption proceeding are not likely to suffer harm as the result of this type of procedural defect.

Indeed, in most cases arising under modern abrogation laws, adoptive parents have relied upon the grounds of fraud and misrepresentation in the initial adoption proceeding in seeking to annul an adoption.[139] One category of fraud claims involves an allegation that the agency placing a child for adoption committed fraud by withholding or misrepresenting relevant information about the child.[140] Another significant group of cases involves the claim by an adoptive stepparent that the conduct of his or her spouse, leading to the adoption, was fraudulent.[141] For example, in one case "the general tenor of the stepfather's testimony was that the mother had represented to him that his adoption of [her child] would restore harmony to the marital relationship and put an end to the mother's legal confrontations with the natural father."[142] Another adoptive stepfather alleged, as the basis for annulment, that he "was induced to consent to the adoption of [his stepson] as a result of [the mother's] promise to bear his children."[143] And, in a recent case involving the effort of a parent to set aside the adoption of her same-sex partner's biological child, the annulment petition alleged that the biological mother "was dishonest when she told the [adoption court] that [the petitioner] was her life-long partner, [when] in fact [she] is heterosexual."[144]

Fraud claims like these often receive special deference under state abrogation statutes and from the judges who apply these laws. In this regard, adoption annulment laws follow the model of the general rules of civil procedure in many states, where legislatures and courts have relaxed the usual limits on setting aside

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137. *See* Williams, *supra* note 26, §§ 7[a]-[c] (collecting cases).

138. *See* 2 HOLLINGER, *supra* note 3, § 2.01[2], at 2-7 to -8.

139. Fraud claims may also be raised by the biological parents of adopted children, for example, by alleging that their consent to adoption was obtained in a fraudulent manner. *See* 2 HOLLINGER, *supra* note 3, § 8.01[1][b], at 8-8.16 to -8.17.

140. *See* John R. Maley, Note, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 711-18 (1987).

141. *See* 2 HOLLINGER, *supra* note 3, § 8.02[3][b], at 8-47 to -49. Fraud claims may arise in other circumstances as well. For example, the New York court in *In re Sohn*, 507 N.Y.S.2d 969 (Sur. Ct. 1986), set aside a stepmother's adoption of her husband's children, on the ground that she had misrepresented her intention to rear the children in the orthodox Jewish religion. Notably, the adoptive mother, the father, and the children's guardian all supported the annulment petition, which was filed after the parents divorced.

142. C.C.K. v. M.R.K., 579 So. 2d 1368, 1370 (Ala. Civ. App. 1991).

143. *In re* Adoption of Jason R., 151 Cal. Rptr. 501, 503 (Ct. App. 1979).

144. Mariga v. Flint, 822 N.E.2d 620, 628 (Ind. Ct. App. 2005).

final judgments for cases involving fraud.[145] This principle enhances the opportunities for adoptive parents, who typically raise fraud claims, in the adoption annulment setting.

One type of statutory preference for fraud-based adoption annulment claims waives the statute of limitations. For example, The South Dakota annulment provision states: "*Except in any case involving fraud*, any proceeding for the adoption of a child . . . shall be in all things legalized, cured, and validated two years after the proceeding is finalized,"[146] apparently permitting fraud claims to be raised at any time. A more limited type of statutory preference involves the creation of a longer limitation period for annulment petitions in cases involving claims of fraud. For example, the Colorado adoption statute establishes a one-year time period to challenge adoptions "in cases of stepparent adoption . . . by reason of fraud upon the court or fraud upon a party," compared with the ninety day limit for challenges made "by reason of any jurisdictional or procedural defect."[147]

Even in the absence of legislative recognition, the courts may show special deference to adoption annulment petitions involving allegations of fraud. For example, in *M.L.B. v. Department of Health and Rehabilitative Services*,[148] the Florida Court of Appeals allowed the adoptive parents to file an annulment petition five years following a final adoption order based on the alleged fraud of the placing agency in failing to reveal information about the child's psychological problems.[149] Notably, the Florida statute at that time established "procedural irregularity" as the ground for annulment, without any mention of fraud, and included a one-year statute of limitations.[150] Thus, the court

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145. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 12.6 at 610 (4th ed. 2005) (observing that statutes of limitation may be waived as to "equitable" bases for setting aside judgments, including fraud); RESTATEMENT (SECOND) OF JUDGMENTS § 78 cmt. c (1982).

146. S.D. CODIFIED LAWS § 25-6-21 (1999) (emphasis added); *see also* ALA. CODE § 26-10A-25(a) (1992) (exempting fraud claims from one-year time limit); CONN. GEN. STAT. ANN. § 45a-24 (West 2004) (barring direct or collateral attack on final orders "except for fraud"); HAW. REV. STAT. ANN. § 578-12 (LexisNexis 1999) (imposing one-year limit on "direct attack upon any ground other than fraud"); LA. CHILD. CODE ANN. art. 1262 (2004) ("No action to annul a final decree of adoption of any type may be brought except on the grounds of fraud or duress."); N.C. GEN. STAT. ANN. § 48-2-607(a), (c) (West 2000) (exempting fraud claim by biological parent from general rule barring all claims to set aside final adoption order); S.C. CODE ANN. § 20-7-1800 (1985 & Supp. 2008) ("[T]his section [which generally forecloses any direct or collateral attack on final adoption orders] may not be construed to preclude a court's inherent authority to grant collateral relief from a judgment on the ground of extrinsic fraud [defined as] fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.").

147. COL. REV. STAT. § 19-5-214(1) (West 2005); *see also* CAL. FAM. CODE §§ 9102(a), (b) (West 2004) (setting out a three-year time limit for fraud claims and one-year limit for other types of claims).

148. 559 So. 2d 87 (Fla. Dist. Ct. App. 1990).

149. *Id.* at 88.

150. *Id.* The Florida annulment statute applied in the *M.L.B.* case was subsequently amended.

recognized fraud as the basis for an annulment claim, even though it was not set out in the state statute, and waived the one-year statutory time limit.[151]

Notably, the Florida legislature responded to the decision in the *M.L.B.* case by repealing the "procedural irregularity" provision, and enacting a one-year limit on actions to vacate adoption orders "on any ground."[152] The legislature apparently intended to affirm the availability of fraud claims, and to simultaneously extend the one-year time limit to all annulment claims, including those based on fraud. The question lingers, however, whether judges will acknowledge the authority of the legislature to impose such a time limit on the inherent, equitable power of courts to cure their own errors in these

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See infra text accompanying note 152. A number of state annulment statutes, like the Florida statute applied in *M.L.B.*, refer to any irregularity in the initial adoption proceeding. *See M.L.B.*, 559 So. 2d at 88; ARIZ. REV. STAT. ANN. § 8-123 (2007) (one year time limit); DEL. CODE ANN. tit. 13, § 918 (West 2006) (six month time limit); MO. REV. STAT. § 453.140 (West 2003) (one year time limit); N.C. GEN STAT. ANN. § 48-2-607(a), (c) (West 2000) (one year time limit as to "any defect or irregularity, jurisdictional or otherwise, in the proceeding" except for claims of fraud by biological parent). Other state annulment statutes refer to "procedural defects" or "jurisdictional defects." *See* D.C. CODE § 16-310 (2001) (jurisdictional or procedural defect; one year time limit); KY. REV. STAT. ANN. § 199.540(2) (West 2006) (procedural defect; one year time limit); COLO. REV. STAT. ANN. § 19-5-214(1) (West 2005) (jurisdictional or procedural defect; ninety day time limit).

151. *M.L.B.*, 559 So. 2d at 88; *see also* McAdams v. McAdams, 109 S.W.3d 649, 651 (Ark. 2003) (permitting adoptive parent's fraud-based annulment petition to be filed thirty-four years following the adoption, under an abrogation statute providing for procedure-based claims subject to a two-year time limit); *In re* Lisa Diane G., 537 A.2d 131 (R.I. 1988) (permitting adoptive parents' fraud-based annulment to be filed five years following adoption, under general family court rule imposing a one-year filing period as to all final court orders).

152. FLA. STAT. ANN. § 63.182(1) (West 2005 & Supp. 2009). A number of state statutes take the same comprehensive approach to regulating annulment actions as the Florida statute quoted in the text. *See* OR. REV. STAT. ANN. § 109.381(3) (West 2003 & Supp. 2008) ("for any reason"; one year time limit); TENN. CODE ANN. § 36-1-122(2) (West 2002) ("[i]n no event, for any reason"; one year time limit); VA. CODE ANN. § 63.2-1216 (2007) ("for any reason, including but not limited to fraud, duress, failure to give any required notice, failure of any procedural requirement, or lack of jurisdiction over an person"; six month time limit). A number of the comprehensive state annulment statutes are enactments of the Uniform Adoption Act of 1969, which was not retained in the revised Act of 1994 and provided that

> [s]ubject to the disposition of an appeal, upon the expiration of [one] year after an adoption decree is issued the decree cannot be questioned by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter.

UNIF. ADOPTION ACT § 15 (1969); *see* ALASKA STAT. § 25.23.140 (2004); ARK. CODE ANN. § 9-9-216 (West 2004) (applied in Pham v. Truong, 725 S.W.2d 569 (Ark. 1987) to disallow petition for annulment by adoptive father twenty months after entry of adoption decree); N.D. CENT. CODE § 4-15-15 (2004); OHIO REV. CODE ANN. § 3107.16(B) (West 2005).

circumstances.[153]

A related area of judicial activity favoring fraud-based annulment claims embodies the same judicial assumption about inherent power in the courts to correct their own past mistakes. Namely, in states that have no abrogation provision in their adoption codes,[154] the courts may nevertheless entertain petitions by adoptive parents to set aside final adoption orders on the basis of fraud.[155] The Indiana Supreme Court affirmed this judicial authority in the case of *In re Adoption of T.B.*[156] There, the adoptive parents petitioned for annulment five years following the final adoption order, on the ground that the placing agency had failed to disclose the prior sexual abuse of their child.[157] The trial court granted the petition, even though the Indiana adoption code included no provision for setting aside final adoption orders. In affirming the trial court's exercise of jurisdiction, the Indiana Supreme Court stated that "[a]n order granting an adoption is similar to other judgments . . . . Consequently, the trial court retained power over its earlier decree of adoption."[158]

While applying the general state rule for setting aside any final court order based on fraud at any time, the Indiana Supreme Court in *Adoption of T.B.* acknowledged the unique costs associated with the resulting loss of finality in the adoption context. According to the court, "[a]lthough public policy abhors the idea of being able to 'send the child back,' we recognize that an order of adoption is a judgment and may be set aside pursuant to [the general state rule governing

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153. *See* H.G. Hirschberg, Annotation, *Validity and Construction of Statutes Imposing Time Limitations Upon Actions to Vacate or Set Aside an Adoption Decree or Judgment*, 83 A.L.R.2d 945 § 5 (1962 & Supp. 2007) (collecting cases, primarily involving fraud claims by biological parents, where petitions for annulment were permitted after the statutory period was exhausted). *But see* Susan Kempf LeMay, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 482 (1988-89) (stating that the state statutes imposing time limits on adoption annulment actions "apparently eliminat[ed] the inherent power of courts of general jurisdiction to annul decrees procured by fraud").

154. Approximately one-third of states have no adoption abrogation statute. They are Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, Pennsylvania, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

155. There is no uniform position taken by courts on this jurisdictional issue. Thus, one commentator in the field noted that the courts in some states rely upon the "inherent power of court to set aside its own decree"; while other jurisdictions "hold that the right to set aside an adoption decree must be legislatively provided . . . even in cases of fraud." Maley, *supra* note 140, at 715-16; *see also* Carroll, *supra* note 102, at 160 (noting that in 1985 there were nineteen states without an annulment statute where the courts had exercised annulment authority).

156. 622 N.E.2d 921 (Ind. 1993).

157. *Id.* at 922-23.

158. *Id.* at 923. On the merits, the state high court overturned the adoption annulment order because the relevant standard of fraud required proof of intentional misrepresentation, and the agency in this case had been merely negligent in not learning about the child's abuse in a timely fashion. *Id.* at 925.

vacation of final court orders]."[159] Thus, the court raised a concern about the well-being of the child but concluded, without discussion, that this consideration was not relevant under the abrogation of adoption doctrine.

The grounds for setting aside final adoption orders have consistently ignored the interests of the children who are the subject of abrogation orders. The traditional grounds relating to disability, race, and conduct of the child were concerned with the sensibilities and preferences of the adoptive parents. The focus of modern abrogation laws on problems in the initial adoption proceeding seeks to address the interests of the adult parties and the integrity of the judicial system. Indeed, these interests receive heightened attention in fraud cases, which constitute the large majority of adoptive parent-initiated annulment cases. The failure to assign priority to the well-being of the adopted child under the abrogation of adoption doctrine renders the doctrine unacceptable as an avenue by which parents may seek to terminate their status.

IV. Limited Consideration of Children's Interests Under the Abrogation Doctrine

The Indiana Supreme Court in *In re Adoption of T.B.*[160] acknowledged that allowing parents to "send a child back" following adoption was a prospect that "public policy abhors."[161] The relevant public policy here involves the interest of society in stable families and, especially, the positive impact of stability on the interests of children.

The best interest of the child is a primary consideration under most rules of law governing judicial decisions affecting children, including the voluntary termination of parental rights statutes. As discussed in Part II, parents requesting status termination under these statutes are motivated by the desire to avoid financial responsibility and, in certain cases, the burden of raising a troubled child. The courts rule on each request by assessing the facts and circumstances of the child and the family under the best interest of the child standard.

By way of contrast, the statutory grounds for adoption annulment, such as fraud or procedural irregularity, do not routinely take into consideration the present and future welfare of the adopted child. Thus, for example, in *Adoption of T.B.*, the parent-child relationship was judicially terminated, without any consideration of the child's interests, because the parents were able to prove fraud in the initial adoption proceeding.[162] The parents' motivation appeared to be the overwhelming responsibility of caring for a child with problems resulting from earlier, undisclosed mistreatment.[163] Fraud may also provide the basis for adoptive parent annulment in cases where the parent's motivation is avoidance of financial responsibility for the child. The resulting impact upon the child

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159. *Id.* at 924.

160. 622 N.E.2d 921 (Ind. 1993); *see also supra* notes 156-59 and accompanying text.

161. *Id.* at 924.

162. *Id.* at 925.

163. *Id.*; *see supra* notes 156-58 and accompanying text.

receives little or no attention under the fraud standard.

There are limited exceptions in the law of adoption annulment to this general observation about the absence of children's interests in the formulation and application of legal standards for terminating adoptive parent-child relationships. For example, the Colorado abrogation statute first sets forth the grounds of "fraud" and "jurisdictional or procedural defect" for setting aside final adoption decrees, and provides the following directive to the courts: "When a final decree of adoption is attacked on any basis at any time, . . . [t]he court shall sustain the [adoption] decree unless there is clear and convincing evidence that the decree is not in the best interests of the child."[164] In other states, courts have sometimes applied the best interests of the child standard in this same limiting fashion, absent a statutory mandate to do so.[165]

More often, however, if the courts raise considerations relating to the adopted child, they play a less dominant role in the judicial analysis. For example, in the case of *In re Adoption of B.J.H.*[166] the Iowa Supreme Court ruled on the adoptive stepfather's annulment petition under the state's general provisions for vacating final decrees based on fraud. According to the court,

> [A]n additional requirement must be imposed where an adoption decree is the judgment to be vacated. . . . [P]ublic policy requires that we protect the best interests of the children and not annul their adoption for slight cause; on the other hand, judgments should not be sustained when they result from misleading and false circumstances, which would make enforcement unconscionable.[167]

In other words, the best interests of the children were not the sole consideration, nor was it an outright limitation on a possible determination of fraud in the case. Rather, in the words of the Iowa court, the analysis under the quoted standard involved the "balance of competing interests."[168]

By way of contrast, the courts on occasion have applied the best interests of the child standard to the exclusion of all other considerations.[169] For example,

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164. COLO. REV. STAT. ANN. § 19-5-214 (West 2005); *see also* IOWA CODE ANN. § 600A.8(7), 9(3) (West 2001 & Supp. 2008) (imposing a best interest of the child limitation on the ground of fraud as a basis for terminating the rights of adoptive parents under the Iowa termination of parental rights statute).

165. *See* Howard, *supra* note 97, at 561-62 ("[Some courts] use best interests as a limitation on the availability of annulment: no vacation order will issue if it does not serve the child's welfare.").

166. 564 N.W.2d 387 (Iowa 1997).

167. *Id.* at 392.

168. *Id.*; *see also In re* Adoption of Children by O., 359 A.2d 513, 514 (N.J. Super. Ct.) 1976 ("It should be noted that the protection of the natural parents and the adopting parents should be considered along with that of the child.").

169. *See* Howard, *supra* note 97, at 562 ("[Some] courts have recognized the best interest of the child as an independent ground for adoption annulment.").

the Missouri abrogation statute applied in the 1961 case of *In re McDuffee*[170] authorized the annulment of an adoption order based on proof of the child's "venereal infection," "feeble-mindedness," or membership in "a race, the members of which are prohibited by the laws of this state from marriage with members of the race to which the parents by adoption belong."[171] The adoptive parents seeking to set aside the two-year-old adoption of their eleven-year-old daughter did not allege any one of these grounds. Rather, they asserted that the welfare of the child, who had emotional health problems, would be served by termination of the parent-child relationship followed by her placement in an institution.[172] The trial court dismissed the petition because the parents had not alleged a statutory basis for annulment. The Missouri Supreme Court reversed, ruling that the general judicial authority to act in the interests of children established jurisdiction here. Thus, "inasmuch as the welfare of the child . . . is ever paramount in *decreeing* adoption, the same principle is likewise a major factor . . . [in] an action to *annul* thenceforward a prior valid decree of adoption."[173] On the merits, the Missouri Supreme Court in *McDuffee* made its own determination that "the petition . . . is clearly insufficient . . . . The record in this case shows that the natural parents abandoned their child. It cannot now be in the best interest of that child that a court of equity, on petition of its adoptive parents, decree it a similar fate."[174]

This analysis is similar to the judicial analysis in cases arising under the state termination of parental rights statutes, discussed in Part II, that regularly employ a best interests of the child standard. That is, the *McDuffee* court asserted authority to terminate the parent-child status, upon the parent's request, but only if the court determined on the facts of the case that the child's interests would be served by this result.[175] The crucial difference is the absence of any statement of the best interests standard in the Missouri abrogation statute and its counterparts in other jurisdictions. As a result, in most cases, parents do not plead and courts do not apply the best interests of the child standard when parents seek to annul an adoption.

The absence of concern for the future well-being of the child in abrogation doctrine is revealed not just in the typical statutory standards for judicial decisionmaking, but also in the failure to address the child's future disposition in the event of abrogation.[176] The disposition issue is critical if both adoptive parents seek the annulment or if the adoptive parent individually seeking

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170. 352 S.W.2d 23 (Mo. 1961).

171. *Id.* at 25 (citation omitted).

172. *Id.* at 24.

173. *Id.* at 27.

174. *Id.* at 27-28; *see also In re* Adoption of G., 214 A.2d 549, 552 (Monmouth County Ct. 1965) (applying best interests standard, in the absence of a state abrogation statute, to deny the petition of adoptive parents of a child with severe disabilities).

175. *In re McDuffee*, 352 S.W.2d at 28.

176. *See* Carroll, *supra* note 102, at 176 ("Few courts have addressed the issue of what happens to the children once an abrogation is granted.").

annulment is the child's sole parent. In these situations, setting aside the adoption would leave the child with no remaining parent. Generally speaking, two dispositional avenues exist in these circumstances. The child may be moved into the custody of the state[177] or the judge abrogating an adoption may reinstate the custodial arrangement that predated the child's adoption. In most cases, the pre-adoption custodians were the biological parents[178] or a public or private adoption agency.[179] The absence of any consistent inquiry into the matter of the child's disposition in the abrogation statutes and judicial opinions reinforces the inevitable conclusion that the legal focus is not on the child's welfare. By way of contrast, the question of what will happen to the child in the event that parental custody is disrupted plays a key role under the termination of parental rights statutes included in the state child welfare codes.[180]

In the case of *In re Welfare of Alle*,[181] the Minnesota Supreme Court highlighted the divergent foci of that state's adoption annulment and termination of parental rights statutes. In *Alle*, the adoptive stepfather filed a petition under the termination of parental rights provision of the Minnesota child welfare code.[182] The trial court granted the stepfather's petition, over the objections of the custodial mother and the children's guardian ad litem. On appeal, the Minnesota Supreme Court reversed the termination order, stating, "it [cannot] be said that it is in the best interests of the children that their adoptive father's parental rights be terminated"[183]—a necessary finding in the child welfare system.

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177. *See, e.g.*, CAL. FAM. CODE § 9101 (West 2004) ("If an order of adoption is set aside . . . , the court . . . shall direct . . . county [officials] . . . to take appropriate action under the Welfare . . . Code. . . . The county in which the proceeding for adoption was had is liable for the child's support until the child is able to support himself or herself.").

178. *See, e.g.*, IOWA CODE ANN. § 600A.9(3) (West 2001 & Supp. 2008) (authorizing "termination of the adoptive parent's parental rights . . . upon a showing that the adoption was fraudulently induced . . . only after the [biological] parent whose rights have been terminated is given a opportunity to contest the vacation of the termination order"); C.C.K. v. M.R.K., 579 So. 2d 1368, 1371 (Ala. Civ. App. 1991) ("[W]hen the [adoption] court set aside the adoption, it also annulled the consent that was given by the natural father . . . [who] . . . remains the legal father . . . and resumes responsibility for child support as of the date of entry of annulment."); *In re* Welfare of Alle, 230 N.W.2d 574, 577 (Minn. 1975) (directing the trial court in considering stepfather's claim for adoption annulment based on fraud to "determine, first, whether the natural father was a party to the fraud . . . , and, secondly, if so, whether it be in the best interests of the children to have their parental relationship with their natural father restored. If the trial court so holds, those rights and obligations may be re-established.").

179. *See, e.g.*, *In re* Anonymous, 285 N.Y.S. 827, 829 (N.Y. Sur. Ct. 1936) (stating, "let the child be returned to the New York Foundling Hospital, the institution from whence she came" upon abrogation of a six-year-long adoption based on the child's "misconduct").

180. *See* CLARK, *supra* note 5, § 9.4, at 359.

181. 230 N.W.2d 574 (Minn. 1975).

182. *Id.* at 576.

183. *Id.*

At the same time, however, the Minnesota Supreme Court remanded the case back to the trial court to consider whether the earlier adoption order should be annulled, a matter that had not been raised in the father's pleadings. In shifting the analysis to the abrogation doctrine, the *Alle* court also shifted the discussion away from the children's interests. In remanding the case, the court observed that "[t]he trial court based its findings on the motivations and circumstances attendant upon the original adoption proceeding."[184] Thus, "if [the stepfather] is able [on remand] to sufficiently demonstrate that the original adoption decree was obtained fraudulently, then he should be entitled to relief [which] may consist of a direct vacation of . . . the adoption decree that established [his] legal rights and obligations."[185] The *Alle* court understood that the father had two potential avenues to seek to terminate his status and that only one involved the best interests of the children as the primary standard.[186]

The abrogation doctrine results in unequal treatment for adopted children vis-à-vis their biological counterparts, for whom protection under the best interests of the child standard is always available. This result is inconsistent with the general goal of adoption laws, as set out in the Connecticut statute, that the adopted child "shall be treated as if [he or she] were the biological child of the adopting parent, for all purposes."[187] Adopted children, like biological children, deserve the protection of rules that focus on their well-being by requiring a court to consider all of the circumstances of the child and family. As a standard for governing the termination of established family relationship, the abrogation of adoption doctrine is an unfair and discriminatory doctrine, which should be abolished.[188]

The remaining justification for the adoption annulment doctrine arises under the procedural strand of the theory. The assumption is that courts must have the authority to set aside their own orders, including adoption decrees. The next Part of this Article challenges this assumption and the resulting procedural

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184. *Id.*

185. *Id.* at 577.

186. *See also In re* Adoption of T.B., 622 N.E.2d 921, 925 (Ind. 1993) (reversing annulment order based on fraud, and denying mother's standing to raise issue of child's best interests under the termination of parental rights provision of the child welfare code); *In re* B.L.G., 731 S.W.2d 492, 499 (Mo. Ct. App. 1987) (ruling that "[t]estimony seeking to cast doubt upon the validity of the . . . adoption decree had no proper place in [the termination] proceeding" where the sole standard was the best interests of the child); State *ex rel.* R.N.J., 908 P.2d 345, 346, 351-52 (Utah Ct. App. 1995) (involving adoptive stepfather's dual claims for termination of his status: the first, arising under abrogation theory, was dismissed with prejudice by the trial court; the second, arising under parental termination theory, was denied on appeal under the best interests standard), *superseded by statute, as stated in In re* E.H.H., 16 P.3d 1257 (Utah Ct. App. 2000).

187. CONN. GEN. STAT. ANN. § 45a-731(1) (West 2004); *see also supra* note 4 and accompanying text.

188. *See* ALSTOTT, *supra* note 21, at 6 ("Society's 'Do Not Exit' command to parents is grounded in a deep and appropriate commitment to human dignity and equality. . . . Every child deserves a parent who will not exit.").

justification for the abrogation doctrine.

V. Judicial Power to Set Aside Final Adoption Orders

The abrogation of adoption doctrine involves two intertwined strands of legal regulation. The first, discussed above in Parts III and IV, is the establishment of grounds for the termination of parent-child relationships. The second, discussed in this Part, involves the setting aside of a prior court order.

Every adoptive parent-child relationship is created by court order, and the annulment procedure for terminating such a relationship involves a subsequent court order vacating the adoption decree. The continuing existence of the abrogation doctrine in modern law is premised on the assumption that a vacation doctrine in this setting is a necessary corollary to the court-ordered adoption model. This assumption is reflected in the statutory grounds for adoption annulment, discussed in Part III, which reiterate the grounds, such as fraud, mistake, and procedural error, for vacating court orders under general state rules of civil procedure. The fact that adoptive parent-child relationships are created by judicial decree does not necessitate a legal doctrine that entitles adoptive parents to petition to set aside final adoption orders.

In every state, general rules of civil procedure set out the grounds for and time limits on setting aside any final court order in limited, exceptional circumstances.[189] As a starting premise, final judicial orders are beyond challenge in most circumstances. This principle protects the well-defined interests of parties affected by court orders and the public in the finality of matters that have been earlier resolved in the courtroom.[190] Exceptions to this principle of finality have been created by state lawmakers for cases where the interests of justice appear to require the vacation of a final order based on certain defects, such as fraud or procedural error in the initial proceeding.[191] Professor Friedenthal summarized the balancing of interests that occurs in the formulation of legal rules in this context as follows:

> The question of when to allow relief from a judgment is difficult because it requires the delicate balancing of two opposing principles: the important goal of finality requiring that there be an end to litigation, and the desire to render justice in individual cases. . . . American courts typically have given greater weight to finality in this hierarchy of values.[192]

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189. The comprehensive codes of civil procedure in many states, including provisions for the setting aside of final court orders, are patterned after the Federal Rules of Civil Procedure. *See* Restatement (Second) of Judgments § 78 cmt. a (1982). *See generally* 11 Charles Alan Wright et al., Federal Practice and Procedure §§ 2851-73 (2d ed. 1995) (discussing Rule 60 regarding relief from final judgments).

190. Friedenthal et al., *supra* note 145, § 12.6, at 608 ("[T]he important goal of finality requir[es] that there be an end to litigation.").

191. *Id.*

192. *Id.* § 12.6, at 608-09.

Adoption annulment statutes apply this general concept of finality, and create exceptions to it, in the setting of parent-child relationships.[193]

However, the general principles that support the formulation of vacation rules in civil litigation, under which the interests of justice in exceptional circumstances outweigh the presumption of finality, have little or no relevance in cases where the adoptive parent seeks to annul an adoption. Adoption proceedings differ from other types of civil litigation in ways that render the usual concerns addressed by the rules for vacating final court orders less compelling. Here, the interests of the child, the family and the state in finality should prevail.

The typical lawsuit governed by the general rules of civil procedure involves adversarial parties appearing in court over a contested issue, with each side presenting evidence to support its position and the court rendering a decision. This adversary model of litigation is designed to assure that a just result is reached, based on the fair participation of all parties. In this context, the rules for vacating final orders enable the losing party to set aside the order of the court sometime later if a specific defect in the lawsuit, such as mistake, fraud, or procedural error, destroyed that party's right to fair participation.

By way of contrast, the parent whose petition to adopt a child was granted by the court can hardly be characterized as the losing party in a civil litigation. Protections for unsuccessful litigants, who may have lost their case due to a defect in the litigation process, have no application here.[194]

Judicial adoption proceedings are initiated by the prospective adoptive parent. Most often, no party opposes the prospective parent's petition to adopt.[195]

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193. Professor Friedenthal observed that, in addition to general rules of civil procedure, the state legislatures may enact "special statutes [that] authorize specific procedures for seeking relief from certain types of judgments." *Id.* at 609. *See also* 11 WRIGHT ET AL., *supra* note 189, § 2869 (cataloguing federal laws that fall into this category of "special statutes"). The adoption code provisions that set forth specific grounds and procedures for setting aside an adoption decree fall into this category of specialized rules. Where enacted, the adoption annulment provisions preempt the general rules of civil procedure. *See, e.g., In re* Adoption of Hemmer, 619 N.W.2d 848, 850 (Neb. 2000). In *Hemmer*, the court ruled that a general provision "grant[ing] a county court the general power to modify or set aside its orders" was not applicable in an adoption annulment case, because "[s]pecific statutory provisions relating to a particular subject control over general provisions." *Id.* at 849-50.

194. *See generally* Lynne D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 AVE MARIA L. REV. 561, 583 (2005) (observing that "[a]doption proceedings are almost *sui generis*—unlike almost any other judicial proceedings . . . . [and] are not normally adversary proceedings," so general rules of interstate recognition need not be extended to adoption orders).

195. Although certain adoption proceedings are labeled contested adoptions, the contest refers to the objection of the biological parent to the judicial termination of his or her rights, which is a prerequisite to judicial consideration of the adoption petition. *See* 2 HOLLINGER, *supra* note 3, § 8.02, at 8-11 to -33.

The general standard applied by the court in deciding whether to grant the adoption petition is the best interest of the child.[196] In applying this standard, the court has the ultimate responsibility to make sure that relevant evidence regarding the circumstances of the child and the prospective adoptive placement is taken into consideration.[197] In addition, the court is responsible for informing the petitioning parent about the nature of the parent-child relationship, including its permanence in the eyes of the law.[198]

If subsequent evidence reveals that a final adoption order was based on fraudulent or misleading evidence, the interests of the child should remain paramount in establishing rules to address any harm to the adoptive parent resulting from the tainted proceeding. Specifically, the question whether mistakes made by the adoption court should be corrected by severing the adoptive parent-child relationship can be raised under the termination of parental rights statute within the state child welfare system, where judicial determinations are based on the best interests of the child.

To the extent that the adoptive parent suffered harm by virtue of the fraudulent conduct of another party or other error in the adoption proceeding, setting aside the final adoption decree is an inappropriate remedy. By way of analogy, fraud claims have been raised from time to time by biological fathers who believe that their entry into parenthood was the result of fraudulent conduct by the mother, such as her misrepresentation about the use of contraceptives.[199] The courts in such cases have not set aside the legal parent-child status between father and child as a remedy for fraud.[200] This result reflects the importance assigned to the stability of established family ties, even in the face of fraud claims by a reluctant parent.[201]

As discussed in Part III, most annulment claims by adoptive parents fall into one of two categories. The first involves the adoptive stepparent who seeks to terminate the parent-child relationship following divorce from the child's custodial parent; the second involves the adoptive parent who alleges fraud by

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196. *Id.* § 1.01, at 1-3 to -8.

197. *See, e.g.*, UNIF. ADOPTION ACT §§ 3-601 to -603 (1994) (requiring court-ordered evaluation of adoptee and prospective adoptive parents).

198. *See, e.g., id.* § 3-705(a)(8) (1994).

199. *See* WEISBERG & APPLETON, *supra* note 76, at 1138-39 n.4 (collecting journal articles on this topic).

200. *See id.* at 1138 n.3.

201. The termination-of-family-relationship remedy based on fraud *is* readily available in another legal context. Namely, state annulment laws generally establish fraud by one spouse as a ground for annulment of the marriage by the other partner. *See* JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 2.08[G], at 60-62 (3d ed. 2005). In this context, however, the fraudulent actor is one of the parties to the legal relationship being terminated as a remedy for such unlawful conduct. By way of contrast, in the adoption annulment setting, the parent seeks to terminate the parent-child relationship based on the fraud of a third party, not the child. The impact of relationship termination upon the child easily distinguishes the adoption annulment doctrine from the laws permitting marriage annulment based on fraud.

the individual or agency that placed the child for adoption.[202] To the extent that fraudulent misrepresentations by the custodial parent or an agency give rise in some cases to an equitable claim by the defrauded parent, the appropriate remedy would be damages. This remedy would adjust any cognizable inequity between the parties resulting from the unlawful behavior of one of them. Rescission of the adoption order, on the other hand, dramatically impacts the adopted child, who was not a party to the fraud alleged by the adoptive parent.

The realization that damage remedies are superior to the setting aside of final decrees in the adoption context finds expression in the wrongful adoption doctrine. The doctrine, which emerged in the 1980s, creates a damage remedy in cases where adoptive parents can establish harm resulting from the failure of an individual or agency who placed their child without revealing critical information about the child's physical, mental or emotional condition.[203] If the elements of the wrongful adoption tort can be established, the doctrine entitles the parent to damages from the fraudulent party as a remedial alternative to adoption annulment. Several scholars commenting on the wrongful adoption doctrine have taken the position, reiterated here, that adoption annulment is not an appropriate remedy for the parent who was "defrauded" in these circumstances at the time of the adoption.[204]

Besides the interests of individual litigants, the rules that generally allow for setting aside final court orders are also intended to vindicate the interests of the court and the judicial system.[205] In fraud cases, the court is able to purge the fraud that tainted an earlier proceeding and the judicial system, by subsequently vacating the resulting order. The position taken here is that these institutional interests are not sufficiently weighty to disrupt the parent-child relationship established by an adoption decree when the adoptive parent raises a fraud claim after the adoption order is final.

As compared to most civil court orders, the impact of an adoption order is extraordinary. It creates individual rights and duties and impacts family relationships and social structures. The court's failure to perceive fraud in the initial adoption proceeding, such as misrepresentation by a social service agency or misrepresentation by a custodial parent, does not justify a subsequent action

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202. *See supra* notes 139-44 and accompanying text.

203. *See generally* MABRY & KELLY, *supra* note 28, at 731-36; Danielle Saba Donner, *The Emerging Adoption Market: Child Welfare Agencies, Private Middlemen, and "Consumer" Remedies*, 35 U. LOUISVILLE J. FAM. L. 473 (1996-97); LeMay, *supra* note 153; Maley, *supra* note 140.

204. *See* Donner, *supra* note 203, at 510-13; LeMay, *supra* note 153, at 482-83; Maley, *supra* note 140, at 717-18.

205. *See* Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246 (1944) (stating that the extreme fraud perpetuated in that case constituted "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society"), *discussed in* 11 WRIGHT ET AL., *supra* note 189, § 2870).

initiated by the adoptive parent to set the adoption aside.[206]

CONCLUSION

This Article made the case for abolishing the doctrine of adoption annulment. The proposed reform would leave adoptive parents in the same position as biological parents with respect to legal avenues for terminating their status: relief would be available only under the state termination of parental rights statutes.

Several additional recommendations accompany the basic reform proposal in this Article. First, public and private family support programs must be enhanced. Second, the termination of parental rights statutes in every state should clearly extend standing to parents outside the contexts of a dependency proceeding under the child welfare code or a pending adoption. Third, the best interests of the child standard should continue to govern the judicial analysis of such parent-initiated termination petitions.

Permanence in legal parent-child relationships is the norm in the field of family law. Nevertheless, cases arise where termination of the status, initiated by the parent, serves the interests of the child, the family, and the public. Such cases should be resolved by the courts applying the best interests of the child standard under state termination of parental rights laws.

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206. *See generally* Wardle, *supra* note 194, at 588-89 (arguing that the nature and lengthy duration of the relationships established by an adoption decree justify the nonapplication of interstate recognition rules in this area).

TO BE OR TO EXIST: STANDARDS FOR DECIDING WHETHER DEMENTIA PATIENTS IN NURSING HOMES SHOULD ENGAGE IN INTIMACY, SEX, AND ADULTERY

EVELYN M. TENENBAUM*

INTRODUCTION

There are many articles written about end-of-life decisionmaking for elderly adults with dementia, but few about their sexual relationships. At first blush, this disparity seems logical. The medical needs of the elderly must be addressed and decisionmaking concerns will arise when they cannot make medical decisions for themselves. However, focusing so heavily on medical concerns ignores the very real emotional needs and desires of the elderly who are living with dementia.

Those who have dementia can live with the condition for a long time and many end up in nursing homes.[1] Despite their cognitive decline, their needs for intimacy and sex continue.[2] But nursing homes cannot freely allow sexual relationships between demented residents. Due to their cognitive deficiencies, some sexual relationships between demented adults raise issues of consent, rape, and abuse.[3] Obviously, the nursing home must intervene to ensure that unsafe and abusive relationships do not occur.

Beyond the issue of safety, there are other concerns. For example, should a nursing home allow a married resident with dementia to engage in an adulterous relationship in the nursing home? What if the nonresident spouse objects? There are no guidelines for making this decision, yet it involves complex issues concerning adultery, the weight to be given to the resident's prior values formed when competent, and the weight to be accorded the resident's current well-being. Simply ending a relationship without considering these issues would infringe on the resident's rights to privacy and autonomy.

Nursing homes must be given some guidance because this issue is likely to arise with ever-greater frequency as the elderly population increases. This past year, the movie "Away from Her" dealt with the issue of a married woman with Alzheimer's disease who was living in a nursing home and having an intimate relationship with another resident.[4] Similarly, former Supreme Court Justice Sandra Day O'Connor's husband, who is also suffering from Alzheimer's disease and living in a nursing home, was having a "romantic" relationship with another woman in the home.[5] In both of these cases, the nonresident spouse did not

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1. *See infra* Part I.
2. *See infra* Part II.
3. *See infra* Part III.
4. AWAY FROM HER (The Film Farm 2006).
5. Kate Zernike, *Love in the Time of Dementia*, N.Y. TIMES, Nov. 18, 2007, at 41 (Sandra

object to the resident spouse's relationship,[6] but that is not always the case.

The Hebrew Home for the Aged, a nursing home at the forefront in encouraging sexual expression among its residents, has a policy for dealing with a nonresident spouse who objects to his or her spouse's sexual relationship in the nursing home.[7] The nursing home will first meet with the spouse to encourage him or her to accept the adulterous relationship.[8] If, despite counseling, the spouse continues to object to the relationship, the nursing home will take steps to discourage it, including moving the married resident to another floor.[9] Based on anecdotal evidence, the Hebrew Home believes that other nursing homes would also take steps to end an adulterous relationship if the nonresident spouse objected.[10]

This Article questions whether it is right to rely solely on the nonresident spouse's opinion when he or she objects to an adulterous relationship. The Article begins by giving background information on the importance of sex and intimacy to nursing home residents, the nursing home's concerns when demented residents have sexual relationships, and the steps nursing homes can take to encourage and discourage sexual expression among their demented residents. Next, the Article addresses the pros and cons of using various standards for determining whether an adulterous relationship in the nursing home should be allowed to continue. The Article concludes by suggesting a balancing test for making this determination and for evaluating other types of sexual relationships in the nursing home. The test is designed to maximize the patients' rights to express their choices and meet their sexual needs, to take into account the implications of the patients' choices on themselves and their families, and, to the extent possible, to protect the nursing home from liability.

I. Background Information on Dementia and Alzheimer's Disease

In the United States today, more than two million people live in approximately twenty thousand nursing homes.[11] These two million people include about five percent of Americans over the age of sixty-five and about twenty percent of those over eighty-five.[12] An American who lives to be sixty-five years of age has a twenty-five percent chance of residing in a nursing home

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Day O'Connor did not object to her husband's intimate relationship in the nursing home).

6. *See supra* notes 4, 5.

7. Telephone Interview with Daniel A. Reingold, President and Chief Executive Officer, Hebrew Home at Riverdale, New York (June 24, 2008) [hereinafter Reingold Telephone Interview].

8. *Id.*

9. *Id.*

10. *Id.*

11. Ramzi R. Hajjar & Hosam K. Kamel, *Sexuality in the Nursing Home, Part 1: Attitudes and Barriers to Sexual Expression*, 5 J. Am. Med. Directors Ass'n., Mar.-Apr. 2004, at S42, S43 [hereinafter Hajjar & Kamel, *Part 1*].

12. *Id.*

before dying.[13]

More than one half of all nursing home admissions are a result of dementia.[14] There are more than sixty causes of dementia, but the most common is Alzheimer's disease.[15] More than four million Americans have Alzheimer's disease and, due to the aging of the baby boomers and increased life expectancy in general, this number is projected to increase to fourteen million by 2050.[16]

Dementia results in a progressive decline in cognitive functioning.[17]

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13. *Id.*

14. Andrew Casta-Kaufteil, *The Old and the Restless: Mediating Rights to Intimacy for Nursing Home Residents with Cognitive Impairments*, 8 J. MED. & L. 69, 70 (2004) ("Alzheimer's disease is responsible for half of the nursing home residencies in this country.").

15. Alison Patrucco Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 EMORY L.J. 633, 642 (1992) ("Although there are more than sixty causes that produce similar mental disabilities, the principal cause of chronic dementia in the elderly is Alzheimer's Disease.").

16. ABA COMM. ON L. & AGING & AM. PSYCHOL. ASS'N, *Executive Summary to* ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS, at v (2005) ("With the coming demographic avalanche of Boomers reaching their 60s and the over-80 population swelling, lawyers face a growing challenge: older clients with problems in decision-making capacity."); Casta-Kaufteil, *supra* note 14, at 70 ("'Today four million Americans have Alzheimer's disease, and by the year 2050, the number is expected to grow to fourteen million.'") (quoting Erica Wood, *Dispute Resolution and Dementia: Seeking Solutions*, 35 GA. L. REV. 785, 788 (2001)); Joel Leon et al., *Alzheimer's Disease Care: Costs and Potential Savings*, HEALTH AFF., Nov.-Dec. 1998, at 206, 206 ("Alzheimer's disease afflicts 6 to 10 percent of America's elderly and the prevalence of the disease increases dramatically with each succeeding decade of life. Estimates indicate that Alzheimer's disease afflicts 25 to 45 percent of the population age eighty-five and older."); George Byron Smith, *Alzheimer Disease and Other Dementias*, LIPPINCOTT'S CASE MGMT., Mar.-Apr. 2002, at 77-78 ("The best evidence suggests that dementia affects approximately 5% to 8% of persons age 65 and older, 15% to 20% of persons over age 75, and 25% to 50% of persons over age 85 years. [Alzheimer's disease,] which accounts for 50% to 75% of total dementia cases, is the most common dementia type. . . . It is projected that, without a cure, the prevalence of [Alzheimer's disease] will nearly quadruple in the next 50 years, by which time approximately 1 in 45 older Americans will be affected by the disease."); Diana Lynn Woods & Margaret Diamond, *The Effect of Therapeutic Touch on Agitated Behavior and Cortisol in Persons with Alzheimer's Disease*, BIOLOGICAL RES. FOR NURSING, Oct. 2002, at 104, 104 ("Approximately four million Americans have Alzheimer's disease today with projections that this number will be more than triple by the middle of the 21st century.").

17. M. Ehrenfeld et al., *Sexuality Among Institutionalized Elderly Patients with Dementia*, NURSING ETHICS, Mar. 1999, at 144, 145 (Stage I dementia patients suffer from "deterioration of short term memory, resulting in learning difficulties and reduced intellectual activities." Stage 2 dementia patients have "difficulty with concentration, judgment, comprehension, orientation and analysis"); Martin Harvey, *Advance Directives and the Severely Demented*, 31 J. MED. & PHIL. 47, 50, 52 (2006) (at Stage 3, or severe dementia, the individual's deficits are so severe that he or she is no longer "a fully functioning person in a moral, psychological, or social sense." However the patient can still experience "pleasure and pain and express simple, transitory desires and needs."

Individuals with dementia have impaired memories and often also suffer from communication difficulties and the inability to think abstractly or plan activities.[18] As a result of these deficits, demented patients are significantly limited in their ability to make well-informed, rational, decisions and "to advocate for [their] interests and ideals."[19] Dementia can also be accompanied by changes in mood, personality, and behavior.[20]

Alzheimer's disease is a form of dementia[21] that results in an irreversible, progressive mental decline due to nerve cell degeneration in the brain.[22] The salient feature of Alzheimer's is memory impairment,[23] but the disease eventually also destroys "reason, judgment, and language."[24] The Alzheimer's Association

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By Stage 4, or end stage dementia, the patient is in a vegetative state).

18. Smith, *supra* note 16, at 78 ("According to the DSM-IV [*Diagnostic and Statistical Manual, Fourth Edition*], dementia is the development of multiple cognitive deficits that include memory impairment and at least one of the following cognitive disturbances: aphasia (absence of language), apraxia (impairment in the ability to perform purposeful acts), agnosia (inability to recognize familiar objects or persons), or a disturbance in executive functioning (inability to think abstractly or to plan, initiate, sequence, monitor, and stop complex behavior). The cognitive decline must be sufficiently severe to eventually lead to an inability to maintain occupational and social performance.") (citing AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994)).

19. Jeffrey T. Berger, *Sexuality and Intimacy in the Nursing Home: A Romantic Couple of Mixed Cognitive Capacities*, J. CLINICAL ETHICS, Winter 2000, at 309, 311 ("Dementia, by definition, is a chronic and progressive disorder that limits one's ability to make informed choices, and to advocate for one's interests and ideals."); Maartje Schermer, *In Search of 'the Good Life' for Demented Elderly*, 6 J. MED., HEALTH CARE & PHIL. 35, 35 (2003) ("Short- and long-term memory, capacities for understanding, information-processing and rational decision-making all decline during the process of dementia.").

20. Karen Ritchie & Simon Lovestone, *The Dementias*, 360 LANCET 1759, 1759 (2002) (the cognitive changes in dementia are "commonly accompanied by disturbances of mood, behaviour, and personality");Woods & Diamond, *supra* note 16, at 66 (about 80% of dementia patients in nursing homes also develop behavioral symptoms of dementia, which include screaming (disruptive vocalization), restlessness, repetitive questions, wandering, and pacing).

21. Ritchie & Lovestone, *supra* note 20, at 1760 ("High education has been associated with low rates of Alzheimer's disease, which could be at least partly attributable to compensatory strategies that delay detection of the disease.").

22. Smith, *supra* note 16, at 78 ("[Alzheimer's disease] is a chronic, progressive, degenerative illness associated with neuropathological changes for which there is no cure. A definitive diagnosis of [Alzheimer's disease] can be made only at autopsy, when the distinctive neurological changes in the brain can be seen."); Heartspring.net, Alzheimer's Disease—Stages of Dementia, *available at* http://heartspring.net/alzheimers_disease_stages. html (last visited Feb. 16, 2009) ("Progression of symptoms corresponds in a general way to the underlying nerve cell degeneration that takes place in Alzheimer's disease.").

23. Smith, *supra* note 16, at 78 ("Memory impairment is . . . a prominent early symptom [of Alzheimer's disease].").

24. *Id.*

divides the progression of Alzheimer's into seven stages, ranging from no cognitive decline to very severe cognitive decline.[25] At the final stage, "individuals lose the ability to respond to their environment, the ability to speak, and, ultimately the ability to control movement."[26] The Association stresses that these stages are "artificial benchmarks" and that the progression of Alzheimer's "can vary greatly from one person to another."[27] What is consistent is that an individual with Alzheimer's degenerates gradually over a period of months or years.[28]

Although Alzheimer's significantly decreases life expectancy,[29] an individual can live an average of five to eight years after diagnosis,[30] and the length of survival varies from about three to twenty years.[31] Still, "Alzheimer's disease is one of the leading causes of death in older people."[32]

To summarize, more than one half of all patients in nursing homes have dementia, the number of individuals with dementia is increasing rapidly, and individuals diagnosed with dementia can expect to live for many years with gradually decreasing cognitive functioning including diminishing ability to respond to their environment.

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25. Heartspring.net, *supra* note 22.

26. *Id.*

27. *Id.*

28. Smith, *supra* note 16, at 78.

29. Mary Ganguli et al., *Alzheimer Disease and Mortality: A 15-Year Epidemiological Study*, 62 ARCHIVES NEUROLOGY 779, 779 (2009) ("Clinical experience and empirical data suggest that Alzheimer disease . . . shortens life in elderly persons."); Eric B. Larson et al., *Survival After Initial Diagnosis of Alzheimer Disease*, 140 ANNALS INTERNAL MED. 501, 506 (2004) ("In all age groups, patients with Alzheimer disease in our study had decreased survival compared with survival in the general U.S. population."). "Median survival time for women with Alzheimer's disease at 70 years of age was 8.0 years compared with 15.7 years for the U.S. population." The median survival time for men at seventy years of age was 4.4 years compared with 9.3 years for the U.S. population. *Id.* at 504-06.

30. Ganguli et al., *supra* note 29, at 782 ("The mean (SD) survival was 5.9 (3.7) years from the onset of symptoms [of Alzheimer's disease] until death, but depended on age at onset. It ranged from 8.3 (4.6) years in those with onset before the age of 75 years to 3.8 (1.9) years in those with onset after the age of 85 years."); Larson et al., *supra* note 29, at 506 (In a sample taken from community-dwelling elderly people, "[m]en had a median survival of 4.2 years from their initial diagnosis, and women had a median survival of 5.7 years."); Heartspring.net, *supra* note 22 ("People with Alzheimer's live an average of 8 years after diagnosis").

31. Heartspring.net, *supra* note 22 (noting that a person with Alzheimer's disease "may survive anywhere from 3 to 20 years" after diagnosis).

32. Ganguli et al., *supra* note 29, at 779 ("Clinical experience and empirical data suggest that Alzheimer disease is a leading cause of death."); Larson et al., *supra* note 29, at 501 ("One recent study suggests that 7.1% of all deaths in 1995 were attributable to Alzheimer disease, placing it on a par with cerebrovascular disease as the third leading cause of death.").

II. THE NEED FOR INTIMACY AND SEX

People at every age have a fundamental and profound need for intimate relationships.[33] Intimate relationships are strongly correlated with life satisfaction and physical and psychological well-being.[34] Casual relationships do not provide these benefits.[35]

Intimate relationships are strong and deeply rewarding and are characterized by trust, loyalty, emotional security, and respect.[36] They make a person feel valued and needed.[37] Elderly individuals with intimate relationships have a longer life expectancy and a lower risk of getting cancer or cardiovascular disease.[38] They also have better cognitive functioning[39] and are more

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33. Hosam K. Kamel & Ramzi R. Hajjar, *Sexuality in the Nursing Home, Part 2: Managing Abnormal Behavior—Legal and Ethical Issues*, 4 J. AM. MED. DIRECTORS ASS'N, July/Aug. 2003, at 203, 203 (2003) ("Everyone, regardless of age, needs love, touch, companionship, and intimacy.") [hereinafter Kamel & Hajjar, *Part 2*]; Anne-Cathrine Mattiasson & Maja Hemberg, *Intimacy - Meeting Needs and Respecting Privacy in the Care of Elderly People: What is a Good Moral Attitude on the Part of the Nurse/Carer?*, 5 NURSING ETHICS 527, 528 (1998) ("Emotional intimacy in relation to another being is a fundamental human need."); Steven H. Miles & Kara Parker, *Sexuality in the Nursing Home: Iatrogenic Loneliness*, 23 GENERATIONS, Spring 1999, at 36, 36 ("If humane care is the goal, health professionals and long-term-care institutions caring for the elderly must begin to acknowledge the normalcy, indeed the essential nature, of the human need for intimacy.").

34. Casta-Kaufteil, *supra* note 14, at 72 ("Though they are intertwined, intimacy has a discrete effect on one's physical and psychological well-being."); Miles & Parker, *supra* note 33, at 37 ("Intimacy, passionate love, companionate love, and satisfying sexual intimacy are strongly correlated with life satisfaction and psychological well-being.").

35. Miles & Parker, *supra* note 33, at 37 ("Loneliness is not relieved by superficially talking with others or participating in civic activities. The converse of loneliness is intimacy.") (citation omitted).

36. *Id.* ("Intimacy is a sense of being in a deeply rewarding, emotionally intense relationship in which one has a confidante for safe self-disclosure. Intimacy overlaps with the broader concept of 'love,' which encompasses emotional security, respect, helping and playing together, communication, and loyalty.") (citation omitted); *see also id.* at 41 (noting that intimacy is "a place for solace, privacy, confiding, and telling and retelling one's story").

37. Tiina-Mari Lyyra & Riitta-Liisa Heikkinen, *Perceived Social Support and Mortality in Older People*, 61 J. GERONTOLOGY: SOC. SCI. S147, S151 (2006) (explaining that close attachments are related to the feeling of being needed and valued).

38. *Id.* at S147 ("A growing number of studies have documented the beneficial effect of social support on various health outcomes, including survival. This beneficial effect has been confirmed not only in relation to all-cause mortality, but also in relation to several causes of death including cancer, coronary heart disease, and other cardiovascular diseases.").

39. François Béland et al., *Trajectories of Cognitive Decline and Social Relations*, 60 J. GERONTOLOGY: PSYCHOL. SCI., at P320, P327 (2005) (noting that studies suggest that strong social relations help maintain cognitive function into old age); Reijo S. Tilvis et al., *Predictors of Cognitive Decline and Mortality of Aged People Over a 10-Year Period*, 59 J. GERONTOLOGY:

independent.[40]

On the flip side, there is strong evidence that the absence of close personal attachments leads to loneliness[41] and depression.[42] People who are lonely are more likely to need psychological and medical services.[43] Loneliness is also "a powerful predictor of poor adjustment to nursing home life"[44] and is associated with "the most common and intractable of nursing home mental health problems."[45]

Nursing home patients, like the rest of us, do best when their needs for intimacy are met.[46] Indeed, a recent study of older adults found that personal relationships were the single strongest predictor of quality of life.[47]

Intimacy is closely linked to sexuality.[48] Not only is sex a natural way of showing affection, it is a basic human need that lasts throughout adult life and

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MED. SCI., at M268, M272 (2004) [hereinafter Tilvis, *Predictors*] (explaining that studies show loneliness is a precursor to cognitive decline and institutionalization); Reijo S. Tilvis et al., Letter to the Editor, *Social Networks and Dementia*, 356 LANCET 77, 78 (2000) [hereinafter Tilvis et al., *Social Networks*] (noting that loneliness is a predictor of cognitive decline).

40. Lyyra & Heikkinen., *supra* note 37, at S151 ("The feeling of being needed and valued is important; it gives one the strength to take care of oneself.").

41. Miles & Parker, *supra* note 33, at 37 ("Loneliness is the unpleasant feeling of being qualitatively or quantitatively deprived of intimate relationships.").

42. Bonita Krohn & Brenda Bergman-Evans, *An Exploration of Emotional Health in Nursing Home Residents: Making the Pieces Fit*, 13 APPLIED NURSING RES. 214, 216 (2000) (finding that loneliness "often coexists with depression"); Lyyra & Heikkinen, *supra* note 37, at S151 ("The absence of close attachments and recognition of worth causes emotional loneliness and depressiveness."); Sally M. Roach, *Sexual Behaviour of Nursing Home Residents: Staff Perceptions and Responses*, 48 J. ADVANCED NURSING, 371, 376 (2004) ("A lack of bonding with others in a nursing home can lead to loneliness and lack of fulfillment in life.").

43. *See* Miles & Parker, *supra* note 33, at 37; Tilvis et al., *Social Networks*, *supra* note 39, at 77 ("Aged people who are lonely are often characterised by social isolation, impaired health status and increased use of health care services.").

44. Miles & Parker, *supra* note 33, at 37 (Loneliness "is associated with aggression, confusion, feelings of confinement or desertion or powerlessness, and difficulty making decisions.") (citation omitted).

45. *Id.* at 40.

46. *Id.* at 36 ("Like all of us, residents of nursing homes flourish best when diverse needs for intimacy are recognized, respected, and met.").

47. Janice G. Robinson & Anita E. Molzahn, *Sexuality and Quality of Life*, 33 J. GERONTOLOGICAL NURSING, Mar. 2007, at 19, 19 (noting that a survey of 426 elderly individuals living in British Columbia, Canada, showed that "the strongest contributors to the variance of overall [quality of life] were satisfaction with personal relationships, followed by health status and sexual activity").

48. Mattiasson & Hemberg, *supra* note 33, at 529 ("Physical intimacy is closely related to emotional intimacy."); Robinson & Molzahn, *supra* note 47, at 25 ("In this study [of 426 elderly individuals living in British Columbia, Canada], intimacy was highly correlated with sexual activity. . . .").

continues even among frail nursing home residents.[49] While sex obviously includes sexual intercourse, it also includes touching, stroking, fondling, hugging, and kissing.[50] Humans not only need intimacy, but also need sexual contact for their health and well-being.[51]

Our youth-oriented culture generally ignores, or is repulsed by, the thought

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49. *See* Hajjar & Kamel, *Part 1*, *supra* note 11, at S43, S46; *see also* Kannayiram Alagiakrishnan et al., *Sexually Inappropriate Behaviour in Demented Elderly People*, 81 POSTGRADUATE MED. J. 463, 463 (2005) ("Sexuality is part of human nature throughout life. Being elderly and sick does not necessarily mean that there is a decline in sexual desire."); Helen D. Davies et al., *'Til Death Do Us Part: Intimacy and Sexuality in the Marriages of Alzheimer's Patients*, 30 J. OF PSYCHOSOCIAL NURS. 5, 6 (1992) ("Physical touch is a basic human need . . . ."); Mattiasson & Hemberg, *supra* note 33, at 531 ("People's sexual needs apparently last throughout life."); Miles & Parker, *supra* note 33, at 38 (stating that while sexual activity declines with age, a significant proportion of elderly persons, including those in nursing homes, remain sexually active. Indeed, "a large plurality or majority of residents . . . believe that residents should be allowed to have intercourse." Further, "[f]ifteen to 40 percent of men in their 80s have intercourse at least monthly, compared to 5 to 25 percent of women."); James P. Richardson & Ann Lazur, *Sexuality in the Nursing Home Patient*, 51 AM. FAMILY PHYSICIAN 121, 123 (1995) ("At least a significant minority of the elderly want to be sexually active to some extent after admission to nursing homes.").

50. Wendy L. Bonifazi, *Somebody to Love*, 23 CONTEMP. LONG TERM CARE, Apr. 2000, at 22, 23 ("Everyone's definition of 'sexually active' differs and the intimate behavior continuum ranges from touching, hugging, and kissing to fondling, masturbation, and intercourse.") (citation omitted); Janet K. Feldkamp, *Navigating the Uncertain Legal Waters of Resident Sexuality: Residents' Rights to Sexual Expression Can Create Complicated Issues for Facilities and Family Members*, 52 NURSING HOMES, Feb. 2003, at 62, 62 ("The Sexuality Survey commissioned by the AARP and Modern Maturity in 1999 found that . . . [t]he older population views sexual activities as including kissing or hugging, sexual touching or caressing, and sexual intercourse."); Mattiasson & Hemberg, *supra* note 33, at 531 (indicating that sexual activity can be expressed through "touching, stroking, hugging and warmth"); Miles & Parker, *supra* note 34, at 38 (noting that the elderly frequently employ forms of sexual expression other than intercourse, such as "caressing and touching"); Roach, *supra* note 42, at 372 ("The most commonly observed sexual behaviours in nursing homes include hand-holding, kissing, petting and masturbation.").

51. Berger, *supra* note 19, at 309 ("[S]exual activity is common among patients through their ninth and tenth decades of life. Important components of good quality of life for many elderly persons who reside in nursing homes include having intimate relationships and engaging in sexual activity.") (footnote omitted); Casta-Kaufteil, *supra* note 14, at 72 ("Regardless of age, sex is generally beneficial to one's physical health."); Davies et al., *supra* note 49, at 7 ("'Observations have given a scientific basis for what we have instinctively known: human beings need to be cuddled, stroked, and touched to be healthy and survive.'") (quoting L.J. Zefron, *The History of the Laying on of Hands in Nursing*, 14 NURSING FORUM 350, 350-363 (1975)); Kamel & Hajjar, *Part 2*, *supra* note 33, at 206 ("Sexual expression in the nursing home, although a complex and challenging issue, reflects a basic human need and is important for the quality of life and well-being of nursing home residents.").

of sexually active older adults.[52] This leads to a devaluation of the importance of sex to the elderly.[53] Yet, older adults consider sexual expression to be a natural part of their lives[54] and may actually need physical contact more than younger individuals. The elderly are more afraid of losing a loved one, and therefore their need for reassuring physical contact may increase, rather than decrease, with age.[55]

But sex does change with age in terms of "frequency, intensity, and mode of expression."[56] With increasing age, the importance of sexual intercourse decreases and sexual contact is focused more on touching, stroking, and hugging.[57] Although sexual focus changes, the elderly need the freedom to progress from caressing to greater physical intimacy, if they so choose.[58] Preventing them from doing so will create feelings of "frustration and deprivation."[59]

More importantly, sexual contact should be encouraged, rather than discouraged, because physical contact leads to feelings of self-worth[60] and confirms "[b]elonging and togetherness."[61] It lets both members of a couple know they are cared for and valued. Sexual contact can "relieve depression and physical pain, promote health and healthy self-images, provide safe exercise, and

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52. Douglas J. Edwards, *Sex and Intimacy in the Nursing Home: Among Many Issues, Resident Privacy Is Key*, 52 NURSING HOMES, Feb. 2003, at 18, 18 ("Our society equates sex with youth, so we don't expect seniors to be sexually active—or even to have sexual desires."); Ehrenfeld et al., *supra* note 17, at 144 ("Many younger people have a negative attitude toward sexuality among older people; some even view it as immoral and disgraceful.") (footnote omitted).

53. Hajjar & Kamel, *Part 1*, *supra* note 11, at S43 ("In a youth-oriented culture, sexuality is attributed to the young, healthy, and beautiful, and the myth that the elderly are asexual beings predominates. Consequently, the sexual needs of the elderly are frequently overlooked and ignored. Nowhere is this more emphatic than in the nursing home setting.").

54. *See* Ehrenfeld et al., *supra* note 17, at 144-45.

55. *Id.* at 144 (explaining that an elderly person is aware of the possible loss "of the object of their love" and that it is, therefore, "not surprising that the human need for touch, hugs and kisses increases with age in both men and women").

56. Hajjar & Kamel, *Part 1*, *supra* note 11, at S43.

57. *Id.* ("The role of noncoital sexuality assumes an ever-increasing importance in the elderly . . . ."); Mattiasson & Hemberg, *supra* note 33, at 531 ("As we age, sexual activity is reduced and is gradually expressed more through touching, stroking, hugging and warmth.").

58. *See* Miles & Parker, *supra* note 33, at 38.

59. *Id.* ("[N]ursing home residents who are in emotionally intimate relationships experience frustration and deprivation when desired sexual intimacy is blocked by a lack of privacy or nursing interventions."); *see also* Roach, *supra* note 42, at 375-76 ("It has been shown that lack of interpersonal intimacy—involving emotional and physical closeness—can inhibit mental health . . . .").

60. Hajjar & Kamel, *Part 1*, *supra* note 11, at S43 ("[S]exual identity is closely interwoven with one's concept of self-worth.").

61. Mattiasson & Hemberg, *supra* note 33, at 531.

prevent social disengagement."[62]

Although it may at first seem counterintuitive, sexual contact is especially important in nursing homes. Nursing homes are places of isolation and loss, especially for dementia patients.[63] By the time Alzheimer's patients are placed in nursing homes, they may be suffering from loss of memory, self-esteem, and some ability to express themselves.[64] Physical contact is an important method of communicating with Alzheimer's patients.[65] It is a good way to calm and reassure them and to show love and caring.[66]

Nursing home patients also suffer other losses. Nursing homes are places of sickness and death.[67] Nursing home patients are separated from their families and possessions and lose control over most aspects of their lives.[68] They may have enforced dining partners and preselected roommates and can no longer choose their own lifestyles.[69]

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62. Bonifazi, *supra* note 50, at 23; Roach, *supra* note 42, at 372 ("[S]exuality 'provides close, creative contact, warmth, pleasure in mastery, sexual release and reaffirmation of life.'") (quoting Lori Kaplan, *Sexual and Institutional Issues when One Spouse Resides in the Community and the Other Lives in a Nursing Home*, 14 SEXUALITY & DISABILITY 281, 282 (1996)).

63. Bonifazi, *supra* note 50, at 23 ("[I]f anyone ever needed something mentally, physically and emotionally good for him or herself, it's the nursing home resident. [The nursing home] should do everything possible to promote relationships because [the residents are] dealing with such isolation and loss.").

64. Davies et al., *supra* note 49, at 7; Judith Wuest et al., *Becoming Strangers: The Changing Family Caregiving Relationship in Alzheimer's Disease*, 20 J. ADVANCED NURSING 437, 439 (1994) ("[Alzheimer's patients gradually lose] independence as [they lose] the ability to work, the capacities of abstract thought and concentration, activities of daily living ranging from driving to basic hygiene, self-esteem, social skills, short- and long-term memory, leisure interests, range of movement, and even the ability to sleep for an extended period.").

65. Davies et al., *supra* note 49, at 7 ("Massage, stroking, holding hands, hugging, and kissing are a few of the ways that can be used to communicate with [Alzheimer's disease] patients.").

66. *Id.*

67. Casta-Kaufteil, *supra* note 14, at 73 (explaining that "life satisfaction and psychological health" are especially connected to "[i]ntimacy, passionate love, companionship, and satisfying sexual intimacy" in a nursing home environment, which is strongly associated with "death, sickness, and loneliness") (citations omitted).

68. *See* Hajjar & Kamel, *Part 1*, *supra* note 11, at S43 ("Nursing home care is focused on addressing the medical and custodial needs of residents in a safe and therapeutic environment. The resulting structured and regimented environment leaves residents in a situation where control over most aspects of their lives is eroding."); Rosalie A. Kane, *Ethical and Legal Issues in Long-Term Care: Food for Futuristic Thought*, 21 J. LONG-TERM CARE ADMIN., Fall 1993, at 66, 70 ("The litany of problems for residents include . . . enforced proximity to strangers, separation from possessions and lack of freedom to set one's own schedule."); Mattiasson & Hemberg, *supra* note 33, at 528-29 (referring to "the loss of social contacts, family life and other aspects that institutional living often incurs").

69. *See* Miles & Parker, *supra* note 33, at 41 (mentioning "enforced dining partners, lack of

Like everyone else, demented patients need emotional support and want to assert their individuality and autonomy.[70] In this environment, where there is so much loss and isolation, choosing an intimate sexual partner is especially important in helping patients affirm their own identity and in satisfying their emotional needs. Most dementia patients will remain in their nursing home for the remainder of their lives. The nursing home is not just a medical facility. It is also the home where they live.[71]

Thus, to provide humane care, nursing homes must recognize dementia patients' real human need for emotional and physical intimacy.[72] The current trend is to recognize these needs and to work towards enhancing patients' lives by facilitating sexual contact.[73] For dementia patients, "[s]exual sensations are among the last of the pleasure-giving biological processes to deteriorate and are an enduring source of gratification at a time when pleasures are becoming fewer and fewer."[74] Absent compelling concern, patients should not be deprived of these remaining pleasures or of their chances for rewarding, emotionally supportive relationships.

III. JUSTIFICATIONS FOR LIMITING SEXUAL RELATIONSHIPS BETWEEN DEMENTED PATIENTS IN THE NURSING HOME

Unfortunately, there are strong pressures in favor of limiting sexual relationships between dementia patients in nursing homes. Demented patients present a substantial challenge for nursing homes because they may lack the legal capacity to consent to sex and the consent they do give may be difficult to interpret.[75] Dementia, by its very nature, diminishes a patient's ability to

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choice of roommate, intrusive and privacy-destroying surveillance, supervision of relationships" and other restrictive policies in a nursing home); Schermer, *supra* note 19, at 35 ("Life in a nursing home is associated with a loss of privacy, a lack of familiar surroundings and persons, and a lack of opportunity to make one's own choices or to follow one's own life style.").

70. Casta-Kaufteil, *supra* note 14, at 73 ("'People with dementia want to assert their personhood and autonomy . . . .'") (quoting Erica F. Wood, *Dispute Resolution and Dementia: Seeking Solutions*, 35 GA. L. REV. 785, 790 (2001)).

71. *See* Richardson & Lazur, *supra* note 49, at 121.

72. *See* Miles & Parker, *supra* note 33, at 41 ("To humanize nursing homes, we will have to humanize our own perceptions of the people who live in them.").

73. *See* Hajjar & Kamel, *Part 1*, *supra* note 11, at S46 ("Physicians and staff caring for older persons in nursing homes should address [the need for sexual expression] as part of their duty to enhance the quality of life and well-being of their patients."); *see also* Davies et al., *supra* note 49, at 7 ("If it is possible to enhance a patient's life by addressing these [sexual] needs, it is a tragedy not to do so."); Robert Randal Adler, Note, Estate of C.W.*: A Pragmatic Approach to the Involuntary Sterilization of the Mentally Disabled*, 20 NOVA L. REV. 1323, 1362 (1996) ("The time has come for society to recognize that, as human beings, mentally disabled people are entitled to develop, express, and enjoy their sexuality to the same extent as anyone else.").

74. Roach, *supra* note 42, at 378.

75. *See* Kamel & Hajjar, *Part 2*, *supra* note 33, at 205; *see also* Sylvia Davidson, *Issues of*

evaluate social situations rationally and causes "disorientation, poor judgment, and loss of memory."[76] Given these limitations, it may be difficult to determine whether a patient is consenting to sexual relations or is being abused.

Determining consent is further complicated by the limited ability of dementia patients to communicate their feelings and concerns.[77] Even when patients can communicate their general desires regarding sexual interaction, the nature of their consent and the nature of the interaction can be confusing. There are reported instances where demented women mistakenly thought their sexual partners were their husbands.[78] Some patients become disoriented and confused during sex, making the consent ambiguous.[79] And problems may arise when a sexual partner with dementia fails to understand a request to stop[80] or where one of the sexual partners has higher cognitive functioning than the other.[81]

Making matters worse, failure to adequately assess a patient's consent may lead to criminal and tort liability.[82] It is "[a] basic premise in our legal system" that sexual relations are only allowed between consenting adults.[83] Engaging in sexual conduct with individuals who are so mentally incapacitated that they cannot consent is a crime.[84] Although sex has been allowed between

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Intimacy in Dementia Care, 27 PERSPECTIVES, Spring 2003, at 8, 12 ("A particular concern for formal caregivers is often the issue of competence, particularly when two clients are involved.").

76. Davidson, *supra* note 75, at 9 (noting "only a few of the problems that an elderly individual [with dementia] may be struggling with"); *see also* Kamel & Hajjar, *Part 2*, *supra* note 34, at 205 ("As dementia progresses, the capacity to comprehend the potential far-reaching effects of sexual activity is lost.").

77. *See* Berger, *supra* note 19, at 312; Smith, *supra* note 18, at 78.

78. *See* Ehrenfeld et al., *supra* note 17, at 147 (noting that in one case analysis, some women thought the men they had relationships with were their husbands, sometimes even calling the man by their husband's name).

79. *See* Berger, *supra* note 19, at 312.

80. *Id.* ("[A] demented partner may not comprehend a sudden directive by a capacitated partner to halt sexual activity.").

81. *See, e.g.*, Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 391 (1997) (explaining that concerns may arise where there are sexual relations "involving lower mentally functioning women and higher functioning men"); Ehrenfeld et al., *supra* note 17, at 148 (noting that dilemmas arise where the active partner is suffering from a lesser degree of dementia than the passive partner, who is then perceived to be exploited).

82. Kamel & Hajjar, *Part 2*, *supra* note 33, at 204 ("Liability issues are a constant concern for nursing home administrators.").

83. *See* Feldkamp, *supra* note 50, at 64 (discussing assessment of capacity to consent).

84. For example, in New York "[a] person is deemed incapable of consent [to a sexual act] when he or she is . . . mentally disabled." N.Y. PENAL LAW § 130.05(3)(b) (McKinney 2008). Mentally disabled is defined in section 130.00(5) as being "incapable of appraising the nature of his or her conduct." *Id.* § 130.00(5). Similarly, the New Jersey code states that "[a]n actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person . . . the actor knew or should have known was . . . mentally defective." N.J. STAT. ANN. § 2C:14-2a(7) (West 2005); *see also* People v. McMullen, 414 N.E.2d 214, 217 (Ill. App. Ct. 1980) (explaining

institutionalized mentally retarded and mentally ill patients, the facilities have an obligation to ensure that vulnerable residents have the legal capacity to consent and are not raped or sexually assaulted.[85]

The government rarely prosecutes mentally incapacitated individuals who have sexual relations with victims who cannot consent because they do not meet the competency requirement to stand trial.[86] However, administrators and staff at a nursing home can come "dangerously close" to criminally facilitating a sexual offense if they encourage sex between demented individuals and the consent is ambiguous.[87] If families object to sexual activity, facilities may also face tort liability for failure to protect a patient from sexual assault.[88]

To further complicate matters, dementia patients may suffer from sexual

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that capacity to consent to sexual intercourse includes understanding the "social and personal costs of the act"); People v. Easley, 364 N.E.2d 1328, 1332 (N.Y. 1977) (explaining that an assessment of mental disability includes not only an understanding of the "physiological nature" of sex, but also "[a]n appreciation of how it will be regarded in the framework of the societal environment and taboos to which a person will be exposed"); Denno, *supra* note 81, at 340 ("Certain classes of people are prohibited from giving their consent to sexual intercourse: children up to a certain age, individuals who are related, and those who are so mentally incapacitated that they cannot provide consent."); Winiviere Sy, Note, *The Right of Institutionalized Disabled Patients to Engage in Consensual Sexual Activity*, 23 WHITTIER L. REV. 545, 561 (2001) (discussing the mentally retarded and finding that "[t]here is a fine line between the capacity to consent and rape .... Problems arise in situations where the patient is unable to consent—because of [her] low IQ—and do[es] not understand the consequences of engaging in sexual activity.").

85. Foy v. Greenblott, 190 Cal. Rptr. 84, 90-91 (Ct. App. 1983) (finding that facilities for mentally ill patients should "minimize interference with a patient's individual autonomy" including the choice "to engage in consensual sexual relations"); N.Y. COMP. CODES R. & REGS. tit. 14, § 633.4(4)(xi)(a) (2009) ("[N]o person [receiving services in a facility operated/certified by the Office of Mental Retardation and Developmental Disabilities] shall be denied: . . . freedom to express sexuality as limited by one's consensual ability to do so, provided such expressions do not infringe on the rights of others."); Denno, *supra* note 81, at 316 (noting that "most mentally retarded individuals have the capacity to consent to sexual relations").

86. Denno, *supra* note 81, at 379 n.422 ("Rape or sexual abuse cases involving mentally retarded adults are unlikely to be prosecuted because such persons may be found incompetent to stand trial, or lack criminal responsibility by reason of 'mental disease or defect.'"). If mentally retarded individuals are unlikely to be prosecuted, it can be assumed that elderly demented patients are also unlikely to be prosecuted.

87. *Id.* at 390 ("[P]rogram staff can come dangerously close to criminal facilitation of a sexual offense . . . if they encourage sexual activity between mentally retarded individuals who may not be legally capable of consent."); Sy, *supra* note 84, at 570 ("In situations where a patient is not capable 'to consent to sexual relations, . . . [but] is nevertheless permitted . . . to do so,' a service provider could be charged with facilitating a statutory rape.") (quoting Clarence J. Sundram & Paul F. Stavis, *Sexual Behavior and Mental Retardation*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 448, 453 (1993)).

88. *See* Denno, *supra* note 81, at 379 n.426.

disinhibition.[89] Sexual disinhibition results in inappropriate, and sometimes physically aggressive, sexual behavior.[90] Such conduct is caused by the patients' deteriorating cerebral functioning, which diminishes their ability to repress sexual impulses.[91] Between seven and seventeen percent of dementia patients suffer from sexual disinhibition and exhibit inappropriate sexual behavior.[92] This behavior is more common in men than in women.[93] Sexual disinhibition requires nursing homes to be especially vigilant in ensuring that sexual activity is voluntary. Because sexual disinhibition generally increases with cognitive decline, nursing homes must also ensure that ongoing sexual relationships remain consensual.

Nursing homes must consider all of these complexities and balance the patients' needs and rights to sexual intimacy against their obligation to protect vulnerable residents from nonconsensual sexual contact.[94] They must provide enough supervision to protect against rape and sexual abuse while not over-supervising so that sexual intimacy is stifled.[95]

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89. Alagiakrishnan et al., *supra* note 49, at 463 ("Patients with dementia may become sexually disinhibited as cognitive deficits progress.").

90. *See, e.g.*, Alagiakrishnan et al., *supra* note 49, at 463 ("The prevalence of physically aggressive behaviour increases with the progression of dementia . . . ."); Chadi Alkhalil et al., *Treatment of Sexual Disinhibition in Dementia: Case Reports and Review of the Literature*, 11 AM. J. THERAPEUTICS 231, 232 (2004) (listing inappropriate behaviors resulting from sexual disinhibition).

91. *See* Alagiakrishnan et al., *supra* note 49, at 463 ("While most sexually aggressive behaviour/inappropriate sexual behaviour occurs in the moderate to severe stages of Alzheimer's dementia, it may also be seen in early stages of fronto-temporal dementia because of the lack of insight and disinhibition."); Alkhalil et al., *supra* note 90, at 231 ("It is reasonable to assume that dementing illnesses diminish a person's ability to appropriately repress sexual urges."); Mattiasson & Hemberg, *supra* note 33, at 532 (mentioning the problem of "uninhibited sexual behaviour in elderly persons with dementia in whom deteriorating cerebral function affects the control of impulses").

92. Alkhalil et al., *supra* note 90, at 231; *see also* Hajjan & Kamel, *Part 1*, *supra* note 11, at S46 ("in one study 7% of 178 nursing home residents with dementia of the Alzheimer's type exhibited sexually disinhibited behavior").

93. Alagiakrishnan et al., *supra* note 49, at 464 ("Sexually inappropriate behaviour is generally known to be more common in men than in women."); Hajjar & Kamel, *Part 1*, *supra* note 11, at S46 ("Men with dementia are more likely than women with dementia to exhibit inappropriate sexual behaviours."); Kamel & Hajjar, *Part 2*, *supra* note 33, at 203 ("Men with dementia are more likely than cognitively impaired women to exhibit inappropriate sexual behaviors.").

94. *See* Casta-Kaufteil, *supra* note 14, at 78; *see also* Kamel & Hajjar, *Part 2*, *supra* note 33, at 205 ("On the one hand, nursing homes have a duty to provide residents with liberty to associate freely with others, which includes intimate and sexual freedom. On the other hand, they must protect residents from abuse, injury, and neglect.").

95. *See* Denno, *supra* note 81, at 394 ("[Nursing homes should balance] the competing interests inherent in protecting a vulnerable class of individuals while allowing them their right to engage in consensual sexual relationships."); Roach, *supra* note 42, at 375 ("The outcomes of

IV. METHODS FOR ENCOURAGING AND DISCOURAGING SEXUAL RELATIONS

Some nursing homes respond to this seemingly impossible dilemma by disregarding sexual preferences and effectively forcing celibacy on their demented residents. Others take a more humane approach and work to facilitate healthy and non-abusive sexual relationships.[96]

It is easy to understand why sexual relationships might be logistically difficult in a nursing home, especially between dementia patients. Nursing homes are built to efficiently provide services and a safe environment.[97] Caregivers often see demented patients as "frail, dependent, and in need of constant supervision to compensate for their physical and cognitive losses."[98] For these reasons, nursing homes are constructed with long open hallways, flanked by the residents' rooms.[99] The rooms are generally shared and the doors kept open.[100] The hallways are busy with residents, staff, and visitors and are visible from a "centrally located nursing station."[101] Given this setting, it is no surprise that residents and staff cite lack of privacy as the primary reason for the limited sexual activity in nursing homes.[102]

Some nursing homes further limit patients' opportunities for sexual

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standing guard are ultimately avoidance of sexuality issues, and this results in lack of fulfilment in residents' lives and subsequently a decline in health status."); Sy, *supra* note 84, at 548 (noting that "service care providers . . . cannot feasibly provide enough supervision to prevent rape and, at the same time, not over supervise to avoid violating a patient's privacy rights").

96. Roach, *supra* note 42, at 374 ("The ethos of [a nursing home] can range from one that is restrictive in terms of sexual expression to one that is responsive to residents' needs.").

97. *See id.* at 372 ("[Many nursing homes] are geared toward institutional efficiency and the desires of the residents' families rather than to the residents' own needs."); *see also* Barnes, *supra* note 15, at 643 ("Institutionalization assures that certain services are readily available when needed, and reduces the risk of accidents, such as falls through protective supervision and a controlled institutional environment.").

98. Daniel A. Reingold, *Rights of Nursing Home Residents to Sexual Expression*, 5 CLINICAL GERIATRICS, Apr. 1997, at 52, 52.

99. *See* Hajjar & Kamel, *Part 1*, *supra* note 11, at S44-45.

100. *Id.* at S45 ("Even in resident's own rooms, open doors, and multiple beds moderately separated by drawn curtains limit privacy.").

101. *Id.*; *see also* Edwards, *supra* note 52, at 20 ("With shared rooms, busy corridors, and frequent visitors . . . couples can encounter difficulty when trying to find a time and place to be intimate.").

102. Berger, *supra* note 19, at 310 ("Often, private space is limited or unavailable, despite the fact that residents and staff cite privacy as a major concern."); Miles & Parker, *supra* note 33, at 38 ("[L]ack of partners and privacy are the greatest reasons for the lack of sexually intimate relationships in nursing homes."); Richardson & Lazur, *supra* note 49, at 122 ("Lack of privacy was the most frequent reason given, by both residents and staff, for lack of sexual activity in residents."); Roach, *supra* note 42, at 372 ("[A number of studies have] found that older people living in nursing homes were less sexually active than their community-living peers.").

gratification due to liability concerns, potential burdens on staff, and a perception that families would prefer not to have resident family members sexually involved.[103] They actively prevent sexual encounters using physical and psychological means.[104]

Nursing homes can socialize staff to devalue sexual relationships and to view them as a problem, rather than as a healthy means of expressing intimacy.[105] Nursing home staff are receptive to this view because inappropriate sex by demented patients can be "disruptive and burdensome"[106] and the staff is already concerned about reducing the risks of abusive behavior.[107] Moreover, the general population apparently believes that the elderly are asexual so staff may not have a realistic understanding of their sexual needs.[108] Staff attitudes can have a substantial effect on residents.[109] By showing disapproval or by threatening and punishing patients, the staff can create an atmosphere that stifles sexual expression.[110]

Nursing homes can also physically limit sexual relationships by moving one partner to another floor or another nursing home,[111] or simply by denying patients the use of private space. Some homes have resorted to more draconian methods. For example, residents who engaged in sexual activity "have been restrained, have had clothes put on backwards, and have been put in zipperless jumpsuits."[112] Nursing homes may also impose curfews and have nighttime nursing checks.[113]

These measures unnecessarily deny patients their privacy, individuality, and

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103. *See* Reingold, *supra* note 98, at 54.

104. Roach, *supra* note 42, at 375 ("[There were practices used to stop] overt expressions of sexuality. The barriers might be physical—for example, moving a person to another room—or they might be psychological and involve such things as threats and punishment . . . .").

105. Hajjar & Kamel, *Part 1*, *supra* note 11, at S45 ("Sexual behaviors are often perceived by the nursing home staff as problems rather than as expressions of a need for love and intimacy."); Miles & Parker, *supra* note 33, at 38 ("[N]ursing homes socialize staff to devalue and suppress intimate relationships between residents.").

106. Kamel & Hajjar, *Part 2*, *supra* note 33, at 203.

107. Davidson, *supra* note 75, at 12 (mentioning that "[t]he care staff are concerned about risk[s]" of a mentally incapacitated person being taken advantage of in an intimate relationship).

108. *See* Casta-Kaufteil, *supra* note 14, at 74 (discussing the widespread sexual deterrence in nursing homes and the tendency to correlate cognitive impairments, like dementia, with an inability to make choices concerning sexuality); Davidson, *supra* note 75, at 8 ("Uncomfortable feelings and ageist attitudes of staff, and among family members, may mean that sexual interest or activity is frowned upon."); Kamel & Hajjar, *Part 2*, *supra* note 33, at 203, 205.

109. *See* Berger *supra* note 19, at 310 ("[S]taff attitudes may deter sexual expression."); Roach, *supra* note 42, at 371-72 ("It is thought that staff attitudes have a significant impact on both the beliefs and actions of residents.").

110. *See supra* note 104 and accompanying text.

111. *See supra* note 104 and accompanying text.

112. Miles & Parker, *supra* note 33, at 39.

113. *Id.* at 41 (discussing nursing home policies that "diminish relationships" including "curfews [and] nighttime nursing checks").

opportunity to have satisfying sexual relationships.[114] Some nursing homes have shown that it is possible to successfully institute policies that facilitate sexual encounters between demented patients while also protecting the safety of their residents.[115]

To create an environment that supports sexual relationships between demented patients, the nursing home must first formulate a facility-wide policy that encourages these relationships[116] and then develop a system for assessing the capacity of those cognitively impaired residents who want to engage in sexual activity. The Hebrew Home for the Aged, a large nursing facility in Riverdale, New York, is at the forefront in developing a program to support sexual intimacy.[117] In that facility, staff involvement in sexual relationships varies depending on the cognitive functioning of the residents.[118] The greater the

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114. Denno, *supra* note 81, at 392 n.472 (noting that "attempts to suppress sexual behavior in institutions are not only ineffective, they may backfire because the suppressed behavior 'may manifest itself in less acceptable, more hidden and sometimes more violent ways'") (citing DAVID A. SHORE & HARVEY L. GOCHROS, SEXUAL PROBLEMS OF ADOLESCENTS IN INSTITUTIONS, at xiii, xiv (David A. Shore & Harvey L. Gochros eds., 1981); Kamel & Hajjar, *Part 2*, *supra* note 33, at 205 ("Addressing residents' needs for intimacy and sexual expression . . . may help prevent the development of . . . troubling sexual behavior.").

115. Feldkamp, *supra* note 50, at 64 ("Most residents with some sort of diminished cognitive capacity have not been adjudicated incompetent by a probate court and do not have a court-appointed guardian."). The discussions in this Article on nursing home policies regarding sexual expression assume that the residents have not been adjudicated incompetent. If they were, "[f]amily members [or others] serving as court-appointed guardians . . . [would] have surrogate/proxy authority." Dallas M. High, *Caring for Decisionally Incapacitated Elderly*, 10 THEORETICAL MED. 83, 86 (1989); *see also* Barnes, *supra* note 15, at 636 ("Involuntary guardianship requires a finding of incompetency . . . after which a proxy decision-maker, called a guardian, is appointed to manage the property and/or personal affairs of the disabled person.").

116. Casta-Kaufteil, *supra* note 14, at 78 ("'Without a guiding policy, staff and family may decide on management response[s] that disregard[] the preferences of the residents involved'. . . .") (quoting DEBBIE CHRISTIE ET AL., INTIMACY, SEXUALITY, AND SEXUAL BEHAVIOUR IN DEMENTIA: HOW TO DEVELOP PRACTICE GUIDELINES AND POLICY FOR LTC FACILITIES 1, 6 (2002), *available at* http://www.fhs.mcmaster.ca/mcah/cgec/toolkit.pdf).

117. *See* The Hebrew Home for the Aged, Sexual Expression Policy at the Home, http://www.hebrewhome.org/se.asp (last visited Mar. 11, 2009) ("The Hebrew Home at Riverdale is the first facility of its kind to develop a policy to recognize and protect the sexual rights of nursing home residents, while distinguishing between intimacy and sexually inappropriate behaviors."); *see also* Casta-Kaufteil, *supra* note 14, at 75 (noting that the Hebrew Home for the Aged at Riverdale, in Riverdale, NY, has a staff trained to effectively deal with gerontological intimacy issues); Matthew Purdy, *A Kind of Sexual Revolution; At Some Nursing Homes, Intimacy Is a Matter of Policy*, N.Y. TIMES, Nov. 6, 1995, at B1 (noting that the Hebrew Home for the Aged is "a 1,200-bed nursing home and Alzheimer's research center in the Riverdale section of the Bronx").

118. *See* Casta-Kaufteil, *supra* note 14, at 75 (noting that, at the Hebrew Home for the Aged, "the level of staff involvement depends on the resident's cognitive awareness").

patients' cognitive functioning, the less involved the staff become.[119] In dealing with residents with limited cognitive functioning, the staff ensure that sexual relationships are mutually beneficial, consensual, and safe.[120] When a resident's capacity to consent to sexual activity is in question, the staff refer the patient to a registered nurse, social worker, or physician for evaluation.[121] The Hebrew Home maintains that staff assessments are highly reliable because the nursing home staff interacts with the patients on a daily basis.[122]

To insure a successful program, the facility must also provide training to staff and residents, arrange for medical support, and alter the nursing home's generally asexual atmosphere. Staff should receive training regarding the residents' needs and desires for sexual intimacy and the negative effects of ignoring those needs.[123] The Hebrew Home gives this training and also provides case histories so staff can discuss the types of situations that require intervention.[124] Staff who are morally or religiously opposed to sexual relations—such as those between unmarried residents or homosexuals—can transfer to another floor.[125]

Information and counseling about sex also should be provided to interested residents. Some residents may be hesitant to discuss their sexual concerns or to

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119. Edwards, *supra* note 52, at 20 ("At the Hebrew Home, the level of staff involvement depends on the residents' level of cognitive awareness. When the residents in the relationship are alert and oriented, staff involvement is minimal, unless the relationship is imposing itself on the broader resident community.").

120. *Id.* ("'[The staff members at The Hebrew Home for the Aged] are basically making a clinical assessment about consent, mutuality, and the safety and well-being of the couple . . . .'") (quoting Robin Dessel, supervisor in social services at the Hebrew Home); *cf.* Denno, *supra* note 81, at 385 n.446 (suggesting that in determining whether a mentally retarded individual can consent to sex, the following factors should be considered: voluntariness, avoidance of exploitation, avoidance of abuse, ability to stop an interactive behavior when desired, and appropriateness of time and place).

121. Casta-Kaufteil, *supra* note 14, at 80 (explaining that determiners of capacity should consider the resident's "awareness of the relationship, . . . ability to avoid exploitation, [and] . . . awareness of potential risks"); Feldkamp, *supra* note 50, at 64 ("When a resident's capacity to consent to sexual relations is in question, a psychiatrist or psychologist should be consulted to render an opinion regarding the resident's ability to make an informed decision."); Reingold, *supra* note 98, at 57 ("Cases of dementia residents engaging in sexual expression are referred to the unit RN, social worker, or physician . . . for awareness and assessment of the relationship.").

122. Edwards, *supra* note 52, at 20 (citing Robin Dessel of The Hebrew Home who states that "residents are constantly interacting with caregivers").

123. Berger, *supra* note 19, at 310 ("The [nursing home] should maintain an environment that is receptive to residents' sexual needs through staff training and open forums for discussion."); Kamel & Hajjar, *Part 2*, *supra* note 33, at 205 ("[S]taff must be made aware of residents' need for sexual expression.").

124. *See* Bonifazi, *supra* note 50, at 24.

125. *See id.*; *see also* Berger, *supra* note 19, at 312 ("The institution should make provisions for staff nonparticipation in direct patient care when the implications of the sexual activity in care is unavoidable and is morally or religiously offensive to the staff member.").

accept sex as natural and beneficial without support.[126]

The elderly may also need medical support to fully enjoy a sexual relationship. Complaints about sexual dysfunction should be investigated as diligently as other medical complaints.[127] Condoms, Viagra, and vaginal lubricants should be readily available.[128] The nursing home should also institute policies to avoid the spread of sexually transmitted diseases.[129]

The nursing home environment can be modified easily to support sexual expression without compromising safety. For example, the nursing home can deal with privacy concerns by allowing closed doors and providing "do not disturb" signs.[130] The home should also make clear that the reasons for posting a "do not disturb" sign are "nobody's business."[131] To be receptive to sexual contact, residents must feel physically and sexually attractive.[132] The nursing home can enhance these feelings by providing beauty salons and cosmetic services.[133] The home can also encourage satisfying relationships by sponsoring

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126. *See* Kamel & Hajjar, *Part 2*, *supra* note 33, at 205-06 ("Resident education is important as well, because . . . some elderly were initially hesitant to openly discuss sexual issues . . . ."); Richardson & Lazur, *supra* note 49, at 121 ("Barriers to sexual expression for residents of long-term care facilities include . . . an insufficient understanding of sexuality.").

127. Berger, *supra* note 19, at 310 ("Male residents should be screened for erectile dysfunction . . . . Dyspareunia in female residents should be addressed similarly."); Kamel & Hajjar, *Part 2*, *supra* note 33, at 206 ("Loss of sexual performance may need to be investigated to identify any treatable medical conditions, and medical interventions should be offered to interested patients when appropriate."); Richardson & Lazur, *supra* note 49, at 124 ("[P]hysicians and nurses who take care of nursing home residents should evaluate residents' sexual complaints as vigorously as they evaluate other complaints.").

128. Berger, *supra* note 19, at 310 (suggesting that residents have "access to . . . condoms, . . . vaginal lubricants, . . . [and] Viagra").

129. Edwards, *supra* note 52, at 21; Berger, *supra* note 19, at 312 (noting that "[a] cognitively impaired partner may not be able to effectively protect him—or herself from [sexually transmitted] diseases . . . [and that] a limited breach of privacy may be justified in order to protect the resident").

130. Edwards, *supra* note 52, at 20 ("At the Hebrew Home for the Aged at Riverdale in Riverdale, New York, staff try to address [the issue of privacy] by giving one of the residents in a relationship a private room, but when that isn't possible, private time in the residents' room is arranged for each roommate."); Hajjar & Kamel, *Part 1*, *supra* note 11, at S45 ("[A]n increasing number of nursing homes are being designed so that no body [sic] shares a room with a stranger."); Richardson & Lazur, *supra* note 49, at 123 (suggesting "'do not disturb' signs or allowing doors to remain shut" as methods of providing privacy for residents).

131. Bonifazi, *supra* note 50, at 23.

132. Richardson & Lazur, *supra* note 49, at 123 (noting that residents might "feel physically unattractive and, therefore, sexually unattractive").

133. Kamel & Hajjar, *Part 2*, *supra* note 33, at 204 ("[M]aking beauty salons and cosmetic services available for residents may help them feel physically attractive and sexually desirable."); Richardson & Lazur, *supra* note 49, at 123 ("Administrators of nursing homes can make beauty salons and cosmetic services available for residents.").

social events and romantic outings.[134] All of these actions make intimacy and sexual contact a more accepted and expected part of nursing home life.

The remaining concerns involve families, a group not controlled by the nursing home, but who can have an enormous impact on the residents' opportunities for expressing their sexuality.[135] Family responses to a resident's sexuality range from asking the staff to intervene by moving a relative or otherwise stopping a physical relationship to "accept[ing] and even appreciat[ing] the happiness, security, and intimacy some residents find together."[136]

Nursing homes can influence family members who object to sexual relationships by providing counseling and education about the elderly's sexual needs.[137] The Hebrew Home finds that, with staff support, counseling, and education, most families accept their relatives' sexual activity.[138]

The remainder of this Article focuses on what nursing homes should do if, despite counseling, the family continues to object to a resident's sexual relationship, especially if the objecting family member is the non-resident spouse. "[A]pproximately 75% of men and 35 to 50% of women in nursing homes are married."[139] The nursing home must decide if it has an obligation to

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134. *See* Bonifazi, *supra* note 50, at 23 (quoting a resident at The Hebrew Home who explained the need for romantic relations: "Sex is beautiful under the right circumstances. But it's not just sex, its everything else—movies, dinner, holding hands. It makes life more complete."); Kamel & Hajjar, *Part 2*, *supra* note 33, at 206 (noting that "every effort must be made to modify the asexual environment of the nursing home . . . . [M]ore opportunity for intimate activities[,] . . . social events, and romantic outings" are acceptable methods).

135. *See* Bonifazi, *supra* note 50, at 26; Kamel & Hajjar, *Part 2*, *supra* note 33, at 205 ("Oftentimes . . . [sexual activity] is complicated by . . . family members' reluctance to accept such a relationship."); Melinda Henneberger, *An Affair to Remember*, SLATE, June 10, 2008, http://www.slate.com/id/2192178/ (describing the impact that families can have on intimate relationships by relating an incident involving a ninety-five-year old man whose son objected to his father's relationship in a nursing home and had him transferred to another facility).

136. Bonifazi, *supra* note 50, at 26; *see also* Ehrenfeld et al., *supra* note 17, at 148 ("The reactions of family members [are] also difficult to generalize. Sometimes the family was not aware or displayed apathy, while at other times they were glad that their relative had found a new relationship."); Reingold, *supra* note 98, at 63 ("[Family members] have been alternately delighted, supportive, or horrified at the thought of their family member being involved in a new sexual relationship. Acceptance of such relationships appears to be most difficult for . . . families of residents who have Alzheimer's disease or other dementias.")

137. *See* Kamel & Hajjar, *Part 2*, *supra* note 33, at 205.

138. *See* Reingold, *supra* note 98, at 63 ("Given the opportunity for staff support and counseling, most family members do come to support and respect their family member's needs and desires for intimacy and sexual expression."); *see also* Miles & Parker, *supra* note 33, at 41 ("[T]he scant research available reports families to be generally supportive toward residents' needs for sexual intimacy.").

139. Hajjar & Kamel, *Part 1*, *supra* note 11, at S46 (citing Gerhard Falk & Ursula A. Falk, *Sexuality and the Ages*, 28 NURSING OUTLOOK 51-57 (1980)).

defer to the marital spouse's wishes or to the needs and desires of the nursing home patient. This decision is complicated by the fact that the non-resident spouse's desire to end the sexual relationship is probably based on his or her belief that the decision is best for the patient and that the patient would have made the same decision if competent.

V. A Hypothetical Adulterous Relationship

For ease of discussion, this Article poses a carefully constructed hypothetical. Later, the Article addresses the nursing homes' responsibilities given some more complicated fact patterns.

In this hypothetical, a couple with dementia live in a nursing home that actively supports sexual expression. One member of the couple has a non-resident spouse who objects to the relationship. The couple has approximately the same level of cognitive functioning, which makes an abusive relationship less likely.[140] The relationship is stable and the two residents obviously enjoy each other's company. The couple is having sexual intercourse.

A stable relationship was chosen because that kind of relationship is likely to be intimate, rather than casual.[141] Moreover, if the couple consistently spend time together and appear to enjoy themselves, the relationship is unlikely to be simply "an outgrowth of dementia."[142]

A. Adultery—Relying on the Nonresident Spouse

Given this hypothetical relationship, should the nursing home simply allow the non-resident spouse to determine if the relationship continues? Relying on the non-resident spouse may make sense because adultery is a crime in twenty-three states.[143]

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140. *See supra* note 7 and accompanying text.

141. *See* Denno, *supra* note 81, at 386-87 ("Far more difficult are those situations where the individuals are severely or profoundly mentally disabled, they are engaging in sexual intercourse (oftentimes with more than one partner), and it is not always clear that the parties 'like' each other.").

142. Edwards, *supra* note 52, at 20; *see also* Bonifazi, *supra* note 50, at 28; *cf.* Denno, *supra* note 81, at 386 (referring to a relationship between two mentally retarded individuals and noting that "the probability of victimization was low because [they] had known and liked each other for a long time").

143. Ala. Code § 13A-13-2 (2006); Ariz. Rev. Stat. Ann. § 13-1408 (2001); Colo. Rev. Stat. Ann. § 18-6-501 (West 2004); Fla. Stat. Ann. § 798.01 (West 2007); Ga. Code Ann. § 16-6-19 (West 2003); Idaho Code Ann. § 18-6601 (West 2006); 720 Ill. Comp. Stat. Ann. § 5/11-7 (West 2002); Kan. Stat. Ann. § 21-3507 (2007); Mass. Gen. Laws ch. 272, § 14 (West 2000); Mich. Comp. Laws Ann. § 750.30 (West 2004); Minn. Stat. Ann. § 609.36 (West 2003); Miss. Code Ann. § 97-29-1 (West 1999); N.H. Rev. Stat. Ann. § 645:3 (2007); N.Y. Penal Law § 255.17 (McKinney 2008); N.C. Gen. Stat. Ann. § 14-184 (West 2000); N.D. Cent. Code Ann. § 12.1-20-09 (Michie 1997); Okla. Stat. Ann. tit. 21, § 871 (West 2002); R.I. Gen. Laws Ann. § 11-6-2 (West 2006); S.C. Code Ann. § 16-15-60 (2003); Utah Code Ann. § 76-7-103 (West

Black's Law Dictionary defines adultery as "[v]oluntary sexual intercourse between a married person and someone other than the offender's spouse."[144] Every statute that criminalizes adultery conforms to this definition by making sexual intercourse with someone other than one's spouse an essential element of the crime.[145]

It is unclear whether demented patients, who do not realize they are married, can commit the crime of adultery. Only one state statute explicitly provides that married participants are not guilty of adultery if they are unaware of their marital status[146] and only one statute provides married participants with the affirmative

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2004); VA. CODE ANN. § 18.2-365 (2004); W. VA. CODE ANN. § 61-8-3 (West 2002); WIS. STAT. ANN. § 944.16 (West 2005).

144. BLACK'S LAW DICTIONARY 52 (7th ed. 1999).

145. ARIZ. REV. STAT. ANN. § 13-1408(A) (2001) ("A married person who has sexual intercourse with another than his or her spouse . . . commits adultery . . . ."); COLO. REV. STAT. § 18-6-501 (West 2004) ("Any sexual intercourse by a married person other than with that person's spouse is adultery . . . ."); GA. CODE ANN. § 16-6-19 (West 2003) ("A married person commits the offense of adultery when he voluntarily has sexual intercourse with a person other than his spouse . . . ."); IDAHO CODE ANN. § 18-6601 (West 2006) ("A married man who has sexual intercourse with a woman not his wife . . . shall be guilty of adultery . . . ."); 720 ILL. COMP. STAT. 5/11-7(a) (West 2002) ("Any person who has sexual intercourse with another not his spouse commits adultery . . . ."); KAN. STAT. ANN. § 21-3507(1) (2007) ("Adultery is engaging in sexual intercourse . . . with a person who is not married to the offender . . . ."); MASS. GEN. LAWS ch. 272, § 14 (West 2002) ("A married person who has sexual intercourse with a person not his spouse . . . shall be guilty of adultery . . . ."); MICH. COMP. LAWS § 750.29 (West 2004) ("Adultery is the sexual intercourse of 2 persons, either of whom is married to a third person."); MINN. STAT. ANN. § 609.36(1) (West 2003) ("When a married woman has sexual intercourse with a man other than her husband . . . both are guilty of adultery . . . ."); N.H. REV. STAT. ANN. § 645:3 (2007) ("A person is guilty of . . . [adultery] if, being a married person, he engages in sexual intercourse with another not his spouse . . . ."); N.Y. PENAL LAW § 255.17 (McKinney 2008) ("A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse . . . ."); N.D. CENT. CODE ANN. § 12.1-20-09(1) (Michie 2007) ("A married person is guilty of . . . [adultery] if he or she engages in a sexual act with another person who is not his or her spouse."); OKLA. STAT. tit. 21, § 871 (West 2002) ("Adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex . . . ."); R.I. GEN. LAWS ANN. § 11-6-2 (West 2006) ("[I]llicit sexual intercourse between any two (2) persons, where either of them is married, shall be deemed adultery . . . ."); UTAH CODE ANN. § 76-7-103(1) (West 2004) ("A married person commits adultery when he voluntarily has sexual intercourse with a person other than his spouse."); VA. CODE ANN. § 18.2-365 (2004) ("Any person, being married, who voluntarily shall have sexual intercourse with any person not his or her spouse shall be guilty of adultery . . . ."); W. VA. CODE ANN. § 48-5-204 (West 2002) ("Adultery is the voluntary sexual intercourse of a married man or woman with a person other than the offender's wife or husband."); WIS. STAT. § 944.16(1) (West 2005) ("A married person who has sexual intercourse with a person not the married person's spouse [commits adultery] . . . .").

146. *See* ALA. CODE § 13A-13-2(b) (2006) ("A person does not commit a crime under this section if he reasonably believes that he and the other person are unmarried persons.").

defense of lack of knowledge of marital status.[147] But "the existence of *mens rea* as a prerequisite to criminal responsibility 'is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence.'"[148] Based on this principle, even where a criminal statute does not require mental culpability, the courts will usually find that the mens rea requirement exists.[149] Therefore, demented patients who do not know they are violating their marriage vows are probably not adulterers.[150]

Even if nursing home residents are not technically committing adultery, some might argue that the nursing home is an accomplice to the crime. An accomplice need only encourage the conduct and know that a crime might result.[151]

These issues are mostly academic because adultery is very rarely prosecuted.[152] As early as 1955, the American Law Institute found that adultery laws were "dead-letter statutes" and removed them from the Model Penal Code.[153] The public's understanding that adultery will not be prosecuted has been repeatedly demonstrated by popular politicians who have publicly admitted

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147. N.Y. PENAL LAW § 255.20 (McKinney 2008) ("In any prosecution for . . . adultery, it is an affirmative defense that the defendant acted under a reasonable belief that both he and the other person . . . were unmarried.").

148. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 95 (1987) (quoting Dennis v. United States, 341 U.S. 494, 500 (1951)).

149. *Id.* at 144. This is not true, of course, where the Legislature makes clear that the statute applies based on strict liability.

150. Reingold, *supra* note 98, at 63 ("[The Hebrew Home takes the position] that married residents with dementing illness, who engage in sexual relations with other partners, are neither knowingly or wittingly violating marriage vows nor committing adultery.").

151. In order to be found guilty of a crime based on accomplice liability, a person must intentionally and knowingly engage in conduct that assists in the commission of the crime. *See* DRESSLER, *supra* note 148, at 417. Mere encouragement may satisfy the assistance requirement. *See id.* at 417-18. It is unclear whether the nursing home could be found guilty as an accomplice to adultery if the patients themselves lack the requisite mens rea. *See id.* at 420-21. To be guilty of an offense, one must act with knowledge that the aided actions constitute a crime. *See* MODEL PENAL CODE § 2.02 (1980).

152. For example, since 1972, there have been only twelve arrests for the crime of adultery in New York. *See* New York State Division of Criminal Justice Services, Criminal Justice Statistics, http://criminaljustice.state.ny.crimnet/ojsa/stats.htm (last visited Mar. 13, 2009). Only three of those arrested were convicted of adultery and all of the convictions resulted in a conditional discharge. *See id.* The New York State Police Field Manual now specifically instructs state troopers not to "make an arrest or initiate an investigation concerning Adultery unless directed by the district attorney." STATE OF NEW YORK, NEW YORK STATE POLICE FIELD MANUAL 33-4 (n.d.). Similarly, in Florida, there have been only fifteen arrests for adultery in the past ten years. Only three of those arrested were prosecuted. *See* http://www3.fdle.state.fl.us/FSAC/ (last visited Mar. 13, 2009).

153. Denno, *supra* note 81, at 350 n.225 (citing Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 49 (1991-92)).

to marital indiscretions.[154] For example, in early 2008, New York's Governor announced that he had committed adultery more than once.[155] There are also many divorces granted on the grounds of adultery, apparently without fear of prosecution.[156]

Indeed, it is unclear whether adultery laws are even constitutional after the U.S. Supreme Court's *Lawrence v. Texas*[157] decision.[158] In *Lawrence*, the Supreme Court invalidated a Texas criminal statute prohibiting consensual homosexual sex based primarily on the petitioner's right to privacy.[159] In his dissent, Justice Scalia noted that statutes against adultery were also "called into question" by the decision.[160]

There is no reason to hold demented individuals to a higher standard than everyone else. Indeed, there may be less reason to prevent demented patients from committing adultery. Society's disapproval of extra-marital sex is based, in part, on the problems that may arise, such as "unplanned pregnancy, single parent families, divorce, venereal disease and AIDS."[161] Most of these concerns either do not apply to the elderly in nursing homes or are likely to be less of a

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154. *Id.* at 351 n.226 ("[D]uring his 1992 campaign, then-Governor Bill Clinton did not deny 'unspecified instances of marital infidelity' when interviewed on the CBS News Program, 60 Minutes . . . . [A]n ABC News Poll conducted the next day reported that . . . 66 % [of the 790 adults surveyed] stated that they could 'vote for a Presidential candidate who had an extramarital affair,' while 80 % said that 'the accusations should not be an issue in the campaign.'" (citing Gwen Ifill, *The 1992 Campaign: Democrats; Clinton Attempts to Ignore Rumors*, N.Y. TIMES, Jan. 28, 1992, at A16)).

155. Pamela Druckerman, *After the End of the Affair*, N.Y. TIMES, Mar. 21, 2008, at A23 ("New York [G]overnor, David A. Paterson . . . said Tuesday that his own extramarital affairs ended several years ago and that his marriage was back on track.").

156. MODEL PENAL CODE § 213.6 Note on Adultery and Fornication pt. 2 (1980) ("The number of divorces granted on the grounds of adultery suggests the certainty with which the divorce-seekers foresaw no prosecution and also reflects the widespread conclusion that criminal prosecution was an inappropriate response to such conduct.").

157. 539 U.S. 558 (2003).

158. Several cases decided prior to *Lawrence* upheld the constitutionality of adultery statutes. *See, e.g.*, Oliverson v. W. Valley City, 875 F. Supp. 1465, 1480 (D. Utah 1995) ("Extramarital sexual relationships are not within the penumbra of the various constitutional provisions or the articulated privacy interests protected by the Constitution."); Suddarth v. Slane, 539 F. Supp. 612, 617 (W.D. Va. 1982) ("[A]dultery is not protected by the First Amendment."); Commonwealth v. Stowell, 449 N.E.2d 357, 360 (Mass. 1983) ("[T]here is no fundamental personal privacy right implicit in the concept of ordered liberty barring the prosecution of consenting adults committing adultery in private.").

159. *Lawrence*, 539 U.S. at 578-79.

160. *Id.* at 590 (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, *adultery*, fornication, bestiality, and obscenity are likewise . . . called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.") (emphasis added).

161. State v. Soura, 796 P.2d 109, 114 (Idaho 1990).

problem.[162]

More importantly, the well-being of the patient should be the nursing home's primary concern, not the existence of "dead-letter statutes."[163] In fact, federal and state laws mandate that nursing homes respect their patients' needs. In order to qualify for reimbursement under Medicare and Medicaid, nursing homes must comply with federal regulations including the Patient Bill of Rights.[164] These enumerated rights require long term care providers to protect the residents' rights to privacy[165] and to assist residents in meeting their "highest practicable physical, mental, and psychosocial well-being."[166] The Bill of Rights also gives residents the right to "communication with and access to persons . . . inside and outside the facility."[167]

These provisions do not explicitly provide a right to appropriate sexual expression, except to the extent that this right can be implied from the patient's right to privacy.[168] However, the intent of these provisions—protecting patients' well-being and association with others—could certainly be construed to encompass intimate sexual activity.[169]

Various state provisions and court decisions also protect the dignity, privacy, and social preferences of those living in nursing homes.[170] Given the nursing

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162. *See* Miles & Parker, *supra* note 33, at 39 (noting that, in a nursing home, "[s]exually transmitted disease is rare; pregnancy is impossible").

163. *See supra* note 153 and accompanying text.

164. 42 C.F.R. § 483.10 (2008); *see* Brogdon *ex rel.* Cline v. Nat'l Healthcare Corp., 103 F. Supp. 2d 1322, 1327 (N.D. Ga. 2000).

165. 42 C.F.R. § 483.10(e) (2008) ("The resident has the right to personal privacy and confidentiality. . . .").

166. *Id.* § 483.25 ("[T]he facility must provide [each resident with] the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being . . . .").

167. *Id.* § 483.10.

168. *See* Reingold, *supra* note 98, at 53 ("Although residents' rights are articulated and secured by regulatory oversight, the right of nursing home residents to sexual expression is not included as an explicit right beyond the implicit right to privacy.").

169. Of course, appropriate sexual expression would include only sexual contact that is consensual and does not negatively impact the residents involved or others in the nursing home.

170. *See* FLA. STAT. ANN. § 393.13(3)(a), (e), (g) (West 2006 & Supp. 2009) ("Persons with developmental disabilities shall have a right to dignity, privacy, . . . social interaction and to participate in community activities . . . [as well as the right to be free from] unnecessary . . . restraint [and] isolation. . . ."); MD. CODE ANN., HEALTH-GEN. § 19-343(b)(2)(i) (West 2009) ("[E]ach resident of a facility has . . . [t]he right to be treated with consideration, respect, and full recognition of human dignity and individuality."); *id.* § 19-344(j)(5) ("Every patient . . . may associate and communicate privately and without restriction with persons and groups of his choice on his own or their initiative at any reasonable hour."); N.Y. COMP. CODES R. & REGS. tit. 14, § 27.4(c) (2009) ("Consistent with a patient's service plan, directors of facilities shall assure patients a reasonable opportunity to associate with any staff member, or patient or members of the general community in order to foster the development of the patient's social competences and preferences."); *see also*

home's obligation to safeguard the residents' "psychosocial well-being" and social preferences, the nursing home should not take steps to end an intimate relationship based solely on the request of the non-resident spouse.

B. Substituted Judgment

The next logical choice would be to use substituted judgment to determine if the adulterous relationship between the demented patients in our hypothetical should be allowed to continue, despite the non-resident spouse's objection. Because the nursing home's obligation is the well-being of its residents, the home would act as surrogate decisionmaker for the married resident. Substituted judgment would require the surrogate decisionmaker to reach, as accurately as possible, the same decision the married resident would have reached if competent.[171] To make this decision, the home would gather information regarding advance directives,[172] prior communications, and core values.[173] The resident's values, when competent, could be extrapolated from his or her previously-developed philosophical and religious beliefs, morals, and patterns of behavior.[174]

Davis v. Watkins, 384 F. Supp. 1196, 1206 (N.D. Ohio 1974) (stating that patients in a state mental facility have rights to "dignity, privacy and humane care [and] . . . [to] suitable opportunities for . . . interaction with members of the opposite sex"); Wyatt v. Stickney, 344 F. Supp. 387, 399 (M.D. Ala. 1972) (finding that a facility for the mentally retarded "shall provide . . . suitable opportunities for the resident's interaction with members of the opposite sex"), *rev'd in part on other grounds and remanded by* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

171. Curran v. Bosze, 566 N.E.2d 1319, 1324 (Ill. 1990) ("[S]ubstituted-judgment theory . . . requires a surrogate decisionmaker to establish, as accurately as possible, what the patient would decide if competent.") (citing *In re* Estate of Longeway, 549 N.E.2d 292, 299-300 (Ill. 1989)); Jennifer K. Robbennolt et al., *Advancing the Rights of Children and Adolescents to be Altruistic: Bone Marrow Donation by Minors*, 9 J. L. & HEALTH 213, 221 (1995) ("When executing a decision based on the substituted judgment standard, a court purports to 'determine and effectuate, insofar as possible, the decision that the patient would have made if competent.'").

172. David DeGrazia, *Advance Directives, Dementia, and 'the Someone Else Problem,'* 13 BIOETHICS 373, 375 (1999) (explaining that advance directives are instructions given by a competent patient "that are to apply only at future times when she is incompetent").

173. *In re* A.C., 573 A.2d 1235, 1250 (D.C. 1990) ("The court in a substituted judgment case . . . should pay special attention to the known values and goals of the incapacitated patient, and should strive, if possible, to extrapolate from those values and goals what the patient's decision would be.").

174. *Curran*, 566 N.E.2d at 1325 ("Under the doctrine of substituted judgment, a guardian of a formerly competent, now incompetent, person may look to the person's life history, in all of its diverse complexity, to ascertain the intentions and attitudes which the incompetent person once held."); *In re* Jobes, 529 A.2d 434, 444 (N.J. 1987) (noting that a personal value system can be determined by "philosophical, theological, and ethical values") (citing *In re* Roe, 421 N.E.2d 40, 56-59 (Mass. 1981)); Lynn E. Lebit, Note, *Compelled Medical Procedures Involving Minors and Incompetents and Misapplication of the Substituted Judgments Doctrine*, 7 J. L. & HEALTH 107,

Courts have traditionally favored substituted judgment, rather than a best interests test, when an incapacitated person was formerly competent.[175] This reflects a policy of respecting the patient's own views and preferences and, therefore, the patient's autonomy.[176] For this reason, the decision will be unique to the patient and need not be in his or her best interests or conform to the norm.[177]

Applying this standard, suppose the married member of our hypothetical couple had been asked, when competent, what he would want done if he was demented, in an adulterous relationship with another nursing home resident, and his spouse objected.[178] He might very well have responded that he would want his spouse's wishes respected. This viewpoint is understandable because, when competent, he would probably not care very much about his future demented self, but he might care greatly about his wife's feelings.[179] Suppose further that his behavior—years of devotion to his wife—demonstrates the strength of his prior decision. Using substituted judgment, the husband's communication of a core value—his overriding concern for his wife—should be honored and his adulterous relationship, commenced when he was incompetent, ended.

Ronald Dworkin and other character theorists would agree with this outcome. They believe that we each create who we are by selecting a set of values that are stable over our lifetime.[180] These values, and our actions based upon them, make

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109-10 (1993) ("The once competent person has developed a system of morals and beliefs, and patterns of behavior which the court can examine when evaluating what she would do in a particular situation.").

175. *Curran*, 566 N.E.2d at 1325 (noting that the substituted judgment standard was not applicable when decisionmaking was required for "an infant or life-long incompetent") (quoting *Longeway*, 549 N.E.2d at 299); *Longeway*, 549 N.E.2d at 300 (holding that where the incompetent was previously competent, the guardian must apply the substituted judgment test when there is clear and convincing evidence that can be used to demonstrate intent); Kevin P. Quinn, Comment, *The Best Interests of Incompetent Patients: The Capacity for Interpersonal Relationships as a Standard for Decisionmaking*, 76 CAL. L. REV. 897, 899 (1988) ("Traditional jurisprudence . . . has tended to focus on the patient's personal autonomy . . .[and to] apply[] the 'substituted judgment' standard . . . [with the intent] to ensure that the surrogate decisionmaker effectuates, to the extent possible, the decision the patient would make if he or she were competent.") (citation omitted).

176. *See* Sara Lind Nygren, *Organ Donation by Incompetent Patients: A Hybrid Approach,* 2006 U. CHI. LEGAL F. 471, 482.

177. Barnes, *supra* note 15, at 740 ("The substituted judgment standard has come to be preferred [by American courts] on the theory that elderly and disabled persons need not make decisions in their best interests because an adult can choose to deviate from the norm.").

178. This example uses a male, rather than a female, nursing home resident only because male residents are more likely to be married. *See supra* note 139 and accompanying text.

179. *Jobes*, 529 A.2d at 444 n.10 (noting that patients care about the impact of their decisions on their families and that this factor can be considered as part of substituted judgment).

180. Harvey, *supra* note 17, at 59 ("To unearth what morally matters most about a person requires us to assess their life as a whole through an appreciation of the continuity that ties his or her life together."); Elysa R. Koppelman, *Dementia and Dignity: Towards a New Method of*

up our rational life plan.[181]

Dworkin distinguishes between experiential interests—or "brute" desires—and critical interests.[182] Experiential interests are the sensations that a person feels. They include pleasure, pain, "desires, tastes, and emotional reactions."[183] Examples of experiential interests are enjoying jazz music, sitting in the sun, or eating ice cream.[184] By contrast, critical interests are identity-defining values and commitments chosen by individuals based on what they believe makes their lives meaningful, and the personal attributes that they want to possess.[185] Critical interests are not just "brute desires," but rather are critical judgments created by "the self's ability to reason, its capacity for self-reflection, and its ability to create rational life plans."[186] Autonomy allows each of us to base our choices on

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Surrogate Decision Making, 27 J. MED. & PHIL. 65, 70 (2002) (explaining that character theorists "presuppose[ ] a self that is steadfastly committed to a stable set of identity-defining values and convictions, a self that expresses continuity over time, a self that is separate from all other selves").

181. Koppelman, *supra* note 180, at 71 ("For character theorists, who a person is *essentially* is expressed in her character or in the rational life plan she expressed somewhat consistently throughout her life.").

182. *Id.* at 70.

183. *Id.*; *see also* Leslie Pickering Francis, *Decisionmaking at the End of Life: Patients with Alzheimer's or Other Dementias*, 35 GA. L. REV. 539, 581 (2001) ("'Experiential interests' . . . include perceptions of pleasure and pain, comfort and discomfort, along with other sensations felt by the patient.").

184. Harvey, *supra* note 17, at 50 ("[S]everely demented individuals can[] enjoy[] . . . simple pleasures like sitting in the sun or eating ice cream."); Koppelman, *supra* note 180, at 70 ("Experiential interests [include] . . . the fact that an individual enjoys jazz music or gets pleasure out of her relationships.").

185. Søren Holm, *Autonomy, Authenticity, or Best Interest: Everyday Decision-making and Persons with Dementia*, 4 MED., HEALTH CARE & PHIL. 153, 157 (2001) ("[Dworkin] defines critical interests in the following way: . . . 'Convictions about what helps to make a life good on the whole . . . . They represent critical judgements rather than just experiential preferences.'") (quoting RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 201-02 (1993)); Koppelman, *supra* note 180, at 70 ("[Critical interests] are convictions about what makes life good on the whole. They are ideas about the kind of person one wants to be and about the kind of life a person thinks is worthwhile."); Michael J. Newton, *Precedent Autonomy: Life-Sustaining Intervention and the Demented Patient*, 8 CAMBRIDGE Q. HEALTHCARE ETHICS 189, 190 (1999) ("Dworkin divided an individual's interests into 2 categories: *experiential* interests, the simple pleasures of doing things because they feel good, and *critical* interests, serious convictions about what makes life significant as a whole.").

186. Koppelman, *supra* note 180, at 70; *see also* Harvey, *supra* note 17, at 58-59 ("'A demented grandfather may now take no interest in the future education of his grandchildren . . . [despite] the fact that prior to onset of dementia he took an interest in their education and made a commitment to it'. . . . [O]ur success or failure at fulfilling the aims of our critical interests over the course of our lives figures greatly in assessing whether we have lived well or ill.") (quoting ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 163 (1990)).

our critical interests—on our self-identifying values and beliefs.[187]

Dementia patients "gradually lose their ability to reason" and the ability "to formulate and sustain rational life plans" based on their critical interests.[188] Dworkin convincingly argues that decisions made on behalf of demented patients should be based on precedent autonomy or the values that mattered to them when they were able to rationally choose.[189] Using precedent autonomy, the values we create and nurture while we are rational—the people we choose to be—will be respected above the brute desires we act upon when we are not competent.[190]

C. Problems with Using a Substituted Judgment Test

But the use of precedent autonomy, which is essentially substituted judgment, presents some serious problems. First, it would obviously be difficult for the nursing home to accurately predict what the demented nursing home resident would have decided, when competent, about continuing his adulterous relationship. Because the nursing home resident is very unlikely to have an advance directive covering intimate relationships,[191] the nursing home would generally be forced to rely on the patient's family to help determine his former

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187. *See* Newton, *supra* note 185, at 190 ("In [Dworkin's] model, autonomy draws its moral force from the way it allows us to express our own character, motivation, and beliefs."); *see also* Harvey, *supra* note 17, at 58 ("Dworkin . . . heavily discount[s] experiential interests in favor of critical interests. For him, the duty to follow an [advance directive] presupposes a categorical principle requiring us to respect the critical interests of others . . . ."); Koppelman, *supra* note 180, at 68 ("Autonomy refers to one's ability (and right) to express, confirm, or create a self (determine *who one is*) through choice and action.").

188. Koppelman, *supra* note 180, at 71; *see also* Holm, *supra* note 185, at 157 ("Dworkin . . . argues that while severely demented persons may still have experiential interests, they cannot have or, perhaps more precisely, cannot form critical interests.").

189. *See* Francis, *supra* note 183, at 573 ("Ronald Dworkin takes a hard line in favor of precedent autonomy: that unless the later expressions reflect reasoned decisions, respect for autonomy requires following the advance directive."); Koppelman, *supra* note 180, at 67 ("Character theorists, such as Ronald Dworkin, suggest that the self whose interests must be respected is the . . . self that was created and nurtured by the patient when she was able."); *see also* Berger, *supra* note 19, at 311 ("Precedent autonomy is the manifestation of the patient's pre-dementia, long-held life values in post-dementia decisions.").

190. *See* Koppelman, *supra* note 180, at 70 (explaining that character theorists believe that critical interests "are what enable us to have control over the expression and creation of our selves").

191. Rebecca Dresser, *Confronting the "Near Irrelevance" of Advance Directives*, 5 J. CLINICAL ETHICS 55, 56 (1994) (noting that even advance directives with respect to medical conditions and treatments "are relatively rare, usually vague, and frequently uninformed by the realities of the patient's current status"); Daniel P. Hickey, *The Disutility of Advance Directives: We Know the Problems, but Are There Solutions?*, 36 J. HEALTH L. 455, 456 (2003) (noting that with respect to end-of-life care, only between "five percent and twenty-five percent of the adult population" have completed an advanced directive").

beliefs and values. Families are usually good surrogate decisionmakers because they care about the patient and know him well.[192] Elderly patients also often prefer having family involved in decisionmaking.[193]

However, there are several studies documenting that family members—even those who were chosen by the patient to be surrogate decisionmakers—are often inaccurate in predicting what the patient would choose when confronted with a specific situation.[194] This may be partially due to a family's emotional interest in believing that a family member has values similar to its own.[195]

The potential for family members to have a distorted perception of a patient's values may be even more of an issue when dealing with an adulterous relationship and all the emotion that situation entails.[196] When confronting adultery, a wife may be especially likely to assess her demented husband's values, when competent, as being similar to her own.[197]

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192. High, *supra* note 115, at 86 (noting that family members make good surrogates because they are "likely . . . concerned about the good of the elderly patient, and often will be the best source of information regarding the patient's wishes, preferences and personal value history").

193. *Id.* ("[E]lderly patients usually prefer that family members . . . become their surrogates.").

194. Sunil Kothari & Kristi Kirschner, *Decision-Making Capacity After TBI: Clinical Assessment and Ethical Implications*, *in* BRAIN INJURY MEDICINE: PRINCIPLES AND PRACTICE 1216 (Nathan D. Zaser et al. eds., 2007) ("Even when the surrogates felt confident that they knew what their families would want, these studies revealed a poor correlation between the surrogate's decisions and the patient's actual preferences."); Mary Coombs, *Schiavo: The Road Not Taken*, 61 U. MIAMI L. REV. 539, 576 (2007) (noting that, in a number of studies "comparing the choices people made for themselves and those of their surrogates [usually spouses and adult children], they agreed between sixty and seventy percent of the time"); *see also* Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 286 (1990) ("[T]here is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation when competent.").

195. Coombs, *supra* note 194, at 581 ("[W]itnesses are likely . . . to be family members or close friends whose perceptions and memories are likely colored by their own beliefs about what they want for the patient and, thus, believe the patient must have wanted for herself."); Jeanie Kayser-Jones & Marshall B. Kapp, *Advocacy for the Mentally Impaired Elderly: A Case Study Analysis*, 14 AM. J.L. & Med. 353, 365 (1989) (noting that the emotional interests of family members "may conflict—consciously or subconsciously—with the preferences and best interests of the [nursing home] resident"); Marah Stith, *The Semblance of Autonomy: Treatment of Persons with Disabilities Under the Uniform Health-Care Decisions Act*, 22 ISSUES L. & MED. 39, 59 (2006) ("[F]amily proxies may be unable to isolate a patient's preferences from their own, even if they attempt to do so").

196. Casta-Kaufteil, *supra* note 14, at 75 (noting that substituted judgment may be a problem "due to family members' reluctance to accept their parents and grandparents as sexual creatures").

197. The wife's emotions in this situation may be especially strong because she may suffer the "double affront" of having her husband not know her and yet be able to be intimate with someone else. *See* Bonifazi, *supra* note 50, at 26 (quoting a social work supervisor, "It's difficult to be subject to the losses and ravages of [dementia]. It's egregious to deal with a [demented family member's] bond to another person.").

Nursing homes have strong incentives to favor the spouse's views. Nursing homes are concerned about liability, and the demented nursing home resident, unlike his competent spouse, generally lacks the "energy, competence, or financial means" to assert his rights.[198] Family members may also devalue the interests of the incompetent resident and defer to the competent spouse to protect her feelings. Thus, not only is it difficult to accurately assess prior values, but where adultery is concerned, the biases in the system favor relying on the opinion of the non-resident spouse.

More importantly, a person's values and desires may change so much with disability that it no longer makes sense to base decisions on the person's prior values. It is difficult for any of us to accurately predict how we would feel with a given disability.[199] Indeed, "there is a large body of evidence that documents how the able-bodied, including clinicians, significantly underestimate the quality of life possible after a disability, even when they live with someone with a severe disability."[200] The disabled often find pleasures in life that they never expected.[201]

Because a non-disabled person cannot fully understand what life will be like with a disability, values formed before the person became disabled should not control.[202] Respecting prior values may prevent the current disabled person from having his or her needs and desires met. For example, it was easy for our hypothetical married resident to decide, when competent, that if he was demented and in an adulterous relationship to which his spouse objected, the relationship should end. He might feel very differently if he was actually demented and facing years of loneliness in a nursing home.

Rebecca Dresser goes even further and argues that prior values should not

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198. Casta-Kaufteil, *supra* note 14, at 76.

199. *See* Kothari & Kirschner, *supra* note 194, at 1216 ("We all find it difficult, beforehand, to accurately imagine a condition significantly different from our own."); Stith, *supra* note 195, at 52 ("It is implausible to expect an able-bodied person fully to have or even understand the perspective she later may have when disabled.").

200. Kothari & Kirschner, *supra* note 194, at 1216 (citations omitted).

201. Barnes, *supra* note 15, at 742 ("An existence that seems demeaning and abhorrent to the competent patient yet may be valuable when it is all of life that remains."); Coombs, *supra* note 194, at 572 ("Advocates for the disabled note that studies seem to suggest that persons with quite limited cognitive and physical capacity to control or even interact with their environment find significant subjective pleasure in those activities and experiences that remain open to them."); Stith, *supra* note 195, at 61 ("[P]atients in a state of even extremely limited capacity may discover new, unexpected reasons to stay alive.").

202. *See* Barnes, *supra* note 15, at 741-42 ("[T]here is room for doubt that the incompetent patient's own treatment choice . . . would follow or include the preferences expressed when competent. Such patients would make choices that reflect their current and future interests as incompetent, severely physically incapacitated individuals, no longer involved in the pursuits of work, friendships, or good health that are paramount for most competent persons."); Stith, *supra* note 195, at 52 ("The views of the able-bodied people and people with disabilities may be very different.").

control if a person has dementia because the demented patient is not the same person that he or she was when competent.[203] In reaching this conclusion, she relies on Derek Parfit's view that personal identity is linked to psychological continuity and connectedness.[204] Although people develop and change as life goes on, they maintain their personal identities through the continuity or connectedness of their "memories, intentions, thoughts, sensations, beliefs and desires."[205] Parfit believes that if, through disease or injury, there is sufficient disruption in memory or other psychological connections, the individual is no longer the same person. He or she essentially becomes a new and different self.[206]

Dresser applies Parfit's theories to individuals with dementia.[207] She posits that if dementia causes severe loss of memory or other radical changes in a person's capacities, needs, and desires, the demented patient essentially becomes a different person.[208] Basing decisions for demented patients on values they formed when competent would, therefore, be like having unrelated strangers make decisions for them.[209] For this reason, Dresser and the experiential theorists believe that the demented patients' experiential interests—or contemporary preferences—should control, rather than the critical interests formed when they were competent.

Some theorists maintain that if the psychological continuity theory were applied to all incompetents, then no advance directives would ever be valid because advance directives are used only when the patient becomes incompetent and therefore, arguably, a different person.[210] Dresser counters that there are

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203. Harvey, *supra* note 17, at 47-48 ("Dresser maintains that the formerly competent patient who authored an [advance directive] and the currently demented patient who now exists are different persons.").

204. *See* Julian C. Hughes, *Views of the Person with Dementia*, 27 J. MED. ETHICS 86, 87 (2001).

205. *Id.*

206. *Id.* at 89 ("[I]f a person's thoughts at one time are disconnected from his or her thoughts at another, for instance because of problems of memory, Locke and Parfit would claim that the person is, properly speaking, not one, but two.").

207. *See* Harvey, *supra* note 17, at 53 (noting that Dresser "draw[s] on Derek Parfit's psychological continuity thesis concerning the nature of the self").

208. *Id.* (noting that Dresser believes that "for the same self/person to exist over time a sufficient number of appropriate psychological connections, particularly in the form of memories, must obtain"); *see also* DeGrazia, *supra* note 172, at 378 ("In some cases . . . a demented patient will have such weak psychological connections with the pre-dementia person in question that the two are literally different persons."); Francis, *supra* note 183, at 575 ("This 'different person' argument draws on a view of personal identity developed by Derek Parfit, that identity consists in psychological connectedness.").

209. Francis, *supra* note 183, at 575 ("If the patient with Alzheimer's is genuinely 'no longer himself,' the directives of precedent autonomy are as irrelevant to him as are the choices of an entirely different human being.").

210. Harvey, *supra* note 17, at 54 ("[I]f psychological 'connectiveness' is wholly constitutive

different concerns with dementia because it is perhaps the only disease where a person can be content and have pleasurable experiences for a long time between competency and death.[211] The demented patient's pleasurable experiences may, therefore, have great value.

Dresser uses Margo, a hypothetical demented woman, as an example of the danger of relying on precedent autonomy to make decisions for demented patients.[212] Margo is severely, but pleasurably, demented.[213] She enjoys "basking in the sun, eating peanut butter and jelly sandwiches, randomly thumbing through books, and painting sets of circles on paper."[214] When competent, she executed an advance directive requesting that no medical procedures be used to prolong her life "in her demented state."[215] Margo now has pneumonia.[216] She can easily be cured with antibiotics and will die without them.[217] Dworkin argues that the advance directive should be followed and that no antibiotics should be administered.[218] Dresser believes that Margo's experiential interests should be given precedence and that there would be egregious harm to Margo if her prior directives were to control.[219]

Dresser's theories have considerable moral weight. Demented patients are human beings "'capable of pleasure and pain—who here and now'" have needs to fulfill.[220] It seems wrong to deny these needs based on values no longer held by the patient. Applying this reasoning to our adultery hypothetical, it seems cruel to deprive a demented patient of a meaningful and intimate relationship in a nursing home based on a marriage he does not even know exists.

Given these concerns, Dresser and the experiential theorists advocate the use of the best interests test in making decisions for demented patients.[221] This test

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of personal identity then . . . [s]eemingly no [advance directives] would be valid since such devices only come into play when their author is rendered incompetent by disease or injury.") (emphasis omitted).

211. *Id.* at 56 (finding dementia unique because "in the case of most diseases, pleasurable experiential states between competency and death do not obtain").

212. *Id.* at 52 (noting that Dworkin first discussed Margo, a "severely demented individual").

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *See id.*

219. *Id.* at 56 ("Dresser concludes that Margo's [advance directive] ought to be overridden (or at least to remain inoperative until Stage 4) . . . [because] failing to follow the Best Interest Standard in this instance would allow an avoidable and egregious harm to befall Margo.").

220. Francis, *supra* note 183, at 578 (quoting Agnieszka Jaworska, *Respecting the Margins of Agency: Alzheimer's Patients and the Capacity to Value*, 28 PHIL. & PUB. AFF. 105, 108 (1999)); *see also* Koppelman, *supra* note 180, at 75 ("We have compassion and human empathy for the *now self* . . . the . . . patient is still an individual who deserves to be treated with respect and dignity.") (citation omitted).

221. *See* Harvey, *supra* note 17, at 48 (noting that Dresser advocates the best interests

focuses on the present and future experiential interests of the patient, rather than on the critical interests of the past.[222]

D. Best Interests

Perhaps the best choice for dealing with our hypothetical adulterous nursing home resident would be to use the best interests test. This test requires that the nursing home make decisions based on what would benefit the resident the most and cause the least amount of harm.[223] Factors to consider include the resident's "health, safety, and well-being."[224] The best interests test is objective and relies on what a hypothetical average citizen or reasonable person would choose.[225] It does not take the patient's individual preferences into account.[226]

But there are also serious problems with this test. One of the biggest problems is objectivity. It is almost impossible for a substitute decisionmaker to take his or her own values and beliefs out of the decision-making process.[227] Problems with bias are of particular concern where personal, intimate relationships are involved. It is hard to imagine an exercise more difficult—and more connected to our values and beliefs—than determining the importance of an intimate relationship to another's life and well-being.[228]

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standard).

222. *Id.* at 57 (noting that the best interest standard "requires us to look to the present and particularly the future to insure that the severely demented . . . have their pleasurable experiential interests sustained and their painful experiential interests minimized, and where possible, eliminated").

223. *See* High, *supra* note 115, at 88 (noting that the best interests test is based on benefitting and not harming "the patient according to socially shared values of a hypothetical average person"); Holm, *supra* note 185, at 156 (explaining that, in using the best interests test, "[W]e prevent actions based on desires that are detrimental to the best interest of the person in question, and promote actions based on desires that are beneficial").

224. Barnes, *supra* note 15, at 738; *see also* High, *supra* note 115, at 88 (noting that, in determining best interests, objective factors to be considered include "prolongation of life, pain and suffering, quality of life, success of treatment and restoration to normal functioning").

225. High, *supra* note 115, at 88 (noting that, in using the best interests test, "[s]urrogates are . . . obliged to focus on the patient's presumed interests as measured by the hypothetical average citizen or reasonable person").

226. *Id.* (noting that the best interests test does not necessarily "reflect the patient's own preferences"); Lebit, *supra* note 174, at 115 (noting that the Louisiana Court of Appeals "recognized that best interests is a standard based on 'benefit' while substituted judgment is based on personal preference").

227. *See, e.g.*, Kothari & Kirschner, *supra* note 194, at 1216 (discussing the best interest standard and noting that "a family member . . . may unconsciously project her own beliefs or values into the situation"); Quinn, *supra* note 175, at 900 (asking "how the surrogate decisionmaker is to determine the best interests of an incompetent patient whose wishes cannot be known without imposing his or her own values on the decisionmaking process.") (citation omitted).

228. Barnes, *supra* note 15, at 724 ("The nature of lifestyle and associations is as intensely

The potential harm of biased decisionmaking is highlighted by our adultery hypothetical. When deciding whether to allow the married resident's relationship to continue, the nursing home administrators and staff may believe that it is more important to the resident's well-being to have family members visit regularly, and feel comfortable doing so, than for the resident to have a relationship with another demented patient. This assessment may even be likely because the able-bodied tend to devalue the quality of life of the disabled,[229] some administrators and staff may have moral and religious objections to adulterous relationships,[230] and nursing homes have strong incentives to cater to families.[231] The nursing home may use its assessment to end the relationship even though the resident may not recognize his family and may derive enormous personal satisfaction from his adulterous relationship.

That leads to the next problem associated with the best interests test. Basing the resident's fate on the decisionmaker's "assessment[ ] of what a reasonable individual would choose" robs the resident of his ability to make his own choices about his lifestyle and values.[232] It elevates the decisionmaker's assessment above the incompetent resident's own personal feelings about his life and future.[233] In this way, it limits his liberty and deprives him of respect and dignity.[234]

For these reasons, the best interests test should be used only when a person is so incapacitated that he lacks the competence to make the specific decision in question. Agnieszka Jaworska, a noted philosopher, agrees. She believes that demented patients maintain some capacity to make autonomous choices and that,

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personal as bodily integrity in acute care. . . .").

229. *See supra* note 200 and accompanying text.

230. *See supra* notes 105-10 and accompanying text.

231. *See supra* note 198 and accompanying text.

232. Curran v. Bosze, 566 N.E.2d 1319, 1324 (Ill. 1990) (referring to the use of the best interests test in medical treatment cases and noting that it "elevat[es] other parties' assessments of the meaning and value of life—or, at least, their assessments of what a reasonable individual would choose—over the affected individual's own common law right to refuse medical treatment"); *see also* Barnes, *supra* note 15, at 674 ("[T]he beneficence-only model is inappropriate for all but the never-competent and the completely incapacitated person because this model de-emphasizes to the point of extinction the person's own point of view and participation in determining his or her own fate."); Kothari & Kirschner, *supra* note 194, at 1206 ("[E]ven if a person's choice is not in her best interest, the legal and ethical consensus is that her free exercise of will is more important than preventing any harm that may result to her from the choice made.").

233. *See* Holm, *supra* note 185, at 156 (noting that "the range of the person's liberty is restricted [by the best interest test] to those desires and choices that are either beneficial to him, according to the assessment of others, or inconsequential").

234. *See* Barnes, *supra* note 15, at 678 ("[S]ubstitute decision-making has a severe effect on personal liberty and cannot be considered entirely good so long as the individual has some capacity to determine his or her own actions."); *id.* at 736 ("The restriction of liberty created by appointment of a substitute decision-maker is severe"); Koppelman, *supra* note 180, at 79 (explaining that "an objective standard . . . fails to treat the patient with dignity and integrity").

to the extent possible, these choices should be respected.[235]

Jaworska claims that both Dworkin and Dresser are misguided because their theories are grounded in the belief that severely demented patients can no longer form critical interests or maintain consistent goals.[236] Based on this premise, Dworkin and Dresser decide between favoring the critical interests of the prior—or then—self or the experiential interests of the now self.[237]

Jaworska points out that, except in the very late stages of dementia, patients are capable of complex thought and maintain a sense of what is of value to them beyond mere experiential pleasures.[238] She describes patients with moderate and

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235. *See* Jaworska, *supra* note 220, at 109.

236. *Id.*; *see also* Francis, *supra* note 183, at 573 (noting that Jaworska contends that "Dworkin is just wrong in asserting that the expressions of wishes by persons with dementia are characteristically fleeting, conflicting, or absent a link to identity"); Koppelman, *supra* note 180, at 80-81 (explaining that Jaworska believes that "the capacity to express critical interests . . . [lasts] long into the progression of [the] disease . . . [and that] [t]here are typically considerable moments of continuity between the *now self* and the *then self*").

237. Koppelman, *supra* note 180, at 80 ("The theoretical discussion between character and experiential theorists suggests that the capacity to formulate and express critical interests is quickly lost in [Alzheimer's] patients leaving only the expression of experiential interests. And this leads theorists to believe they have to choose which aspect of the self to emphasize . . . ."). Some scholars advocate dealing with this problem by combining substituted judgment and best interests. *See id.* at 81 ("The desires, likes, and dislikes of the *now self* and the character of the *then self* should be integrated in an attempt to determine how the [Alzheimer's] patient should be treated[,] . . . [because doing so] properly balance[s] the two aspects of a complete self."); *see also* Coombs, *supra* note 194, at 584 n.202 (noting that "although the substituted judgment and best interest tests are often stated separately, 'the tests should be viewed not as a dichotomy, but as a continuum of subjective and objective information about the patient that will support a reliable decision'") (quoting Stewart G. Pollack, *Life and Death Decisions: Who Makes Them and by What Standards?*, 41 RUTGERS L. REV. 505, 518 (1989)). Some statutes also link best interests and prior values. MD. CODE ANN., HEALTH-GEN. § 5-601(e)(7) (West 2009) ("'Best interest' means that the benefits to the individual resulting from a treatment outweigh the burdens to the individual resulting from that treatment, taking into account . . . [t]he religious beliefs and basic values of the individual receiving treatment, to the extent these may assist the decision maker in determining best interest."); N.Y. MENTAL HYG. LAW § 80.01 (McKinney 2006) ("[I]n cases involving persons with impaired decision-making capacity, efforts should be made to ensure that health care decisions are based on the best interests of the patient and reflect, to the extent possible, the patient's own personal beliefs and values."); UNIFORM HEALTH-CARE DECISIONS ACT § 2(e) (1993) ("In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.").

238. *See* Coombs, *supra* note 194, at 572 n.157 ("Jaworska persuasively argues that many persons with significant loss of cognitive capacity . . . value certain activities and ways of being, not merely for their immediate experiential pleasure but because they express people's sense of who they are.") (citation omitted); *see also* Francis, *supra* note 183, at 546 (noting that cognitive deficits in demented patients, including the ability "to formulate the abstractions involved in having values . . . are not . . . predictably uniform among patients"); *id.* at 573 (explaining that some patients with

severe dementia who demonstrate a stable set of values through their behavior.[239] For example, she tells of demented patients who consistently show "the desire to help others, the desire to remain independent, the desire not to go to day care, or the desire not to die."[240] She contends that this ability to value requires that we respect the demented patient's current autonomous wishes.[241]

Jaworska's theories are consistent with the view that patients should be allowed to make their own decisions, except in those areas where they lack functional competence. Applying this to our hypothetical married resident, perhaps we should conclude that he has the functional competence to decide that his current relationship should continue. Because he has a stable relationship in the nursing home, he is arguably demonstrating, through his consistent behavior, that his relationship has value to him beyond mere experiential pleasure.

E. Functional Competence

Most courts no longer assess competence by making a single, global decision that a person is competent or incompetent.[242] Instead, they assess functional competence, which allows them to determine that a person is incompetent in some areas but not others.[243] An individual with cognitive deficits may not be competent to handle complex financial transactions, but may be perfectly capable of purchasing groceries.[244] By limiting the determination of incompetency to the

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"moderate to severe dementia . . . evidence values through their behavior"); Holm, *supra* note 185, at 153 ("Except in the very late stages of dementia such persons still have wishes and desires with a complex cognitive nature.").

239. Francis, *supra* note 183, at 573-74.

240. *Id.*

241. *Id.* at 573 ("In Jaworska's view, the capacity to value is what is critical to autonomy."). *But see* Coombs, *supra* note 194, at 572 n.157 (noting that Jaworska does not necessarily believe a patient's current wishes should be followed "if they are internally inconsistent or conflict with prior autonomous choices because of defects in current reasoning capacity").

242. Francis, *supra* note 183, at 546 ("In determining the need for guardianship, courts have been moving away from a focus on incapacities generally, to more specific consideration of whether patients lack the capacities . . . to make reasoned decisions for their [medical] care."); Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier*, 20 N.Y.U. REV. L. 7 SOC. CHANGE 517, 542 (1994) ("Almost all courts adhere to the catechism that competency is not a unitary status and that an individual may be competent for one activity, but not for another."); *see also* Holm, *supra* note 185, at 154 ("Incompetence as an ethical category is thus not a feature primarily of certain kinds of persons but of certain kinds of decisions.").

243. *See* sources cited *supra* note 242.

244. Steven A. Levenson, *Evaluating Competence and Decision-Making Capacity in Impaired Older Patients*, THE OLDER PATIENT, Winter 1990, at 11, 12 (explaining that, using functional competence determinations, "the determination that an individual is incompetent for certain purposes (such as selling property) does not necessarily mean that he is incompetent for other purposes (such as purchasing groceries)"); Richardson & Lazur, *supra* note 49, at 123 (noting that "a patient with early dementia may not be able to render informed consent to an operation that has

area where the individual cannot function—financial transactions—the court maximizes the patient's autonomy by allowing him to maintain control over other aspects of his life, such as purchasing groceries.[245]

Competency decisions are technically made only by the courts,[246] not by clinicians.[247] However, clinicians regularly make similar determinations.[248] For ease of reference, both types of decisions will be referred to as determining functional competence.

Over the past twenty-five years, many state legislatures have recognized the importance of focusing on functional competence[249] and have revised their guardianship laws accordingly.[250] The concept of maximizing patient autonomy has also been extended to long-term care facilities,[251] which are required to provide care in a manner that least restricts the independence and freedom of their residents.[252]

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a significant risk of death but may be able to decide what flavor ice cream he would like for dessert").

245. Kothari & Kirschner, *supra* note 194, at 1206 ("If a person is competent, we want to make sure that we do not infringe on their ethical and legal right to control their own life.").

246. *Id.* ("'[C]ompetency' is a *legal* category [and] . . . only a court can find someone incompetent in a particular area").

247. *Id.* ("[C]linicians . . . assess the decision making capacities of . . . patients, not their competence.").

248. *Id.* (noting that if all decisions concerning capacity were made by the courts, "this would overwhelm the legal system. In the vast majority of cases, [decisions concerning capacity] can and should be made by clinicians").

249. Barnes, *supra* note 15, at 636-37 ("Many jurisdictions have reviewed their guardianship laws in the past decade . . . to provide more legal rights to preserve remaining autonomy for wards and prospective wards . . . ."); *see, e.g.*, N.Y. MENTAL HYG. LAW § 81.01 (McKinney 2006) (stating the legislature declared it was "establishing a guardianship system . . . which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life").

250. *See, e.g.*, N.Y. MENTAL HYG. LAW § 81.01 Practice Commentaries, at 7 (McKinney 2006) (noting that the "most significant change" in New York's guardianship law is its "focus[] on the functional ability of the person alleged to be in need of a guardian"). Florida's limited guardianship statute requires the court to find and list "[t]he exact nature and scope of a person's incapacities" and "[t]he specific rights that the person is incapable of exercising." FLA. STAT. ANN. § 744.331(6)(a)(1), (4) (West 2005 & Supp. 2009).

251. Mental Health Systems Act, 42 U.S.C. § 9501(1)(A), (F), (G), (J) (2000 & Supp. 2005) (requiring that all state mental health facilities and programs provide treatment in a manner that least restricts patients' rights); Foy v. Greenblott, 190 Cal. Rptr. 84, 91 n.2 (Ct. App. 1983) ("Numerous courts have found a federal constitutional right to the least restrictive conditions of institutional treatment.").

252. *See Foy*, 190 Cal. Rptr. at 90 ("Every institutionalized person is entitled to individualized treatment under the 'least restrictive' conditions feasible—the institution should minimize interference with a patient's individual autonomy . . . ."); Barnes, *supra* note 15, at 742 ("An

Focusing on functional competence is particularly important to residents with dementia. Cognitive deficiencies with dementia can vary greatly from one person to another.[253] Some demented residents, who would be deemed globally incompetent, have "large islands of competence."[254]

The nursing home should, therefore, not simply declare our hypothetical married resident globally incompetent, but rather should assess whether he is functionally competent to decide whether his adulterous relationship should continue. Before that decision can be made, however, the home would have to know what that finding would entail. There are few standards for making a determination of functional competence, and most of the standards that do exist relate to end-of-life decisionmaking.[255] There is almost no guidance concerning decisionmaking capacity to enter into intimate relationships.

F. A Test for Determining Whether an Adulterous or Other Sexual Relationship Should Continue

Based on the limited guidance available, this Article suggests a four-step approach for deciding whether our hypothetical married resident should continue his adulterous relationship. The first three steps enable the nursing home to determine if the resident is functionally competent to make this decision himself. The fourth step provides guidance to the nursing home if the resident is deemed incompetent to make this decision.

The first step is to determine whether the resident has the ability to express his or her desires. This threshold issue is of particular concern with dementia patients because the condition gradually robs them of their ability to communicate; thus, their communication skills may not accurately reflect their abilities.[256] The fast pace of everyday conversation exacerbates this problem.[257]

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individual's best interests in long term care, for example, have been identified as the least restrictive form of care that meets the individual's needs."); *see also* Levenson, *supra* note 244, at 12 ("[H]ealth care facilities . . . should focus on *decision-making capacity* . . . rather than on global competence.").

253. Kamel & Hajjar, *Part 2*, *supra* note 33, at 205 (noting that with dementia, "each case must be individualized" and "when you have seen one case, you have only seen one case").

254. Holm, *supra* note 185, at 153-54; *see also* Stith, *supra* note 195, at 62 ("[A] single standard of capacity promises only an illusion of clarity and may cost people with disabilities their autonomy.").

255. Levenson, *supra* note 244, at 11 ("Determining whether an older person with significant physical and/or mental impairment is competent to make vital decisions is indeed a challenge for physicians and other health professionals."); Bernard Lo, *Assessing Decision-Making Capacity*, 18 LAW MED. & HEALTH CARE , Fall 1990, at 193, 193 ("There are few explicit legal standards for judging competency to make medical decisions."); *see also* Holm, *supra* note 185, at 154 ("[N]o amount of rules will ever allow us to distinguish between competently and non-competently formed desires and decisions in the large gray zone between the obviously competent and the clearly incompetent.").

256. *See* Barnes, *supra* note 15, at 648 (noting that "the needs and abilities of elderly people

But this issue need not be a major concern because desires need not be communicated orally; they can be communicated through a consistent pattern of behavior.[258] Our hypothetical married resident is in a stable relationship, which both members of the couple apparently enjoy. This should be sufficient to satisfy the first step of functional competence.

The second step is to determine what critical interests or values might be affected by acting on these desires. To have functional competence, the resident should understand the consequences and implications of his decision,[259] especially if it impacts important life values and goals. [260] Therefore, in dealing with our hypothetical resident, the nursing home must determine the values that might be implicated by having an adulterous relationship.[261]

In this case, the relevant values would include the resident's interest in protecting his family's feelings, protecting the way he wants to be remembered, and his religious beliefs. Family feelings have been considered an important interest in discussions of end-of-life decisionmaking.[262] Surveys of seriously ill patients demonstrate that they "show strong concern for the physical and

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are poorly understood [and] Alzheimer's disease patients, cut off by their growing inability to communicate with others, receive still less understanding"); Francis, *supra* note 183, at 547-48 (explaining that "[p]atients with dementia . . . may experience difficulties in communication that do not fully reflect their underlying abilities to make choices and express their wishes").

257. Francis, *supra* note 183, at 548; *see also* Barnes, *supra* note 15, at 648 (noting that "Many elderly [patients] cannot express their wishes quickly or well").

258. *See* Francis, *supra* note 183, at 581 (noting Dresser contends that "[w]hen patients cannot communicate preferences directly, . . . [o]ne strategy is to extrapolate preferences from behavior"); *see also In re* Guardianship of Ingram, 689 P.2d 1363, 1371 (Wash. 1984) (noting with respect to medical decisionmaking that "[i]f the ward, despite her inability to understand her needs, is persistent and determined in her preference, it should be given additional weight in the determination"); ABA COMM. ON L. & AGING & AM. PSYCHOL. ASS'N, *supra* note 16, at 12 ("Expressing a choice is the ability to communicate a consistent decision about treatment.") (emphasis omitted); Lo, *supra* note 255, at 195 (noting that, in assessing decision-making capacity, "[t]he patient's decision should be stable over time").

259. *See* Amy M. Haddad, *Determining Competency*, J. GERONTOLOGICAL NURSING, June 1988, at 19, 21 (noting that a "criterion for determining competency is to confirm the patient's ability to understand the implications and consequences of the choices that are made"); Kane, *supra* note 68, at 67 (noting that medical decision-making capacity "depends on the ability to . . . appreciate the implications of the various alternatives").

260. Kothari & Kirschner, *supra* note 194, at 1208 (noting that to assess medical decision-making capacity, "a patient needs to relate the various possible outcomes to their own values" and "need to be able to imagine . . . the consequences of the various options").

261. Berger, *supra* note 19, at 311 (mentioning the importance of "appreciat[ing] the consequences of a decision to be sexually active").

262. There is some debate about whether the impact of end-of-life decisionmaking on family members should be taken into consideration. Doing so "shifts the moral focus away from the patient." Francis, *supra* note 183, at 590.

emotional burdens imposed on surrounding loved ones."[263] These findings have been confirmed by The New York State Task Force on Life and the Law, which found "such strong solicitude [by patients] for their immediate families [that] they would want such interests considered."[264] Family feelings are also potentially important in our adultery hypothetical. If our hypothetical married resident was devoted to his wife for many years before entering the nursing home, we can assume that his fidelity and her feelings if he violated their marital vows, might be important to him.

The importance of being remembered in a certain way has also been discussed in conjunction with end-of-life decisionmaking. As Justice Stevens wrote, "[e]ach of us has an interest in the kind of memories that will survive after death."[265] People care about the memories they leave behind and about how their loved ones will remember them.[266] Our hypothetical married resident might prefer not to be remembered as an adulterer. He may want his wife and children to remember him as a moral, caring, and devoted family member, not someone who began an adulterous relationship in his waning years.

Religion is also an important value. The United States is a very religious nation. According to the 2001 American Religious Identification Survey, eighty-one percent of American adults identify themselves as part of some religious group.[267] In all three of the major U.S. religions, adultery is forbidden.[268] Our hypothetical nursing home resident might, therefore, have a strong interest in being faithful to his religion.

Once the global critical interests have been identified, the next step is to determine if the resident can adequately consider these interests in making his decision. He need not find any particular interest important to him, but he must

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263. Norman L. Cantor, *The Bane of Surrogate Decision-Making Defining the Best Interests of Never-Competent Persons*, 26 J. LEGAL MED. 155, 197 (2005).

264. *Id.* (citing N.Y. STATE TASK FORCE ON LIFE AND THE LAW, WHEN OTHERS MUST CHOOSE: DECIDING FOR PATIENTS WITHOUT CAPACITY 109 (1992)).

265. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 356 (1990) (Stevens, J., dissenting); *see also* Washington v. Glucksberg, 521 U.S. 702, 743 (1997) (Stevens, J., concurring) (mentioning a person's interest in "determining the character of the memories that will survive long after her death").

266. Cantor, *supra* note 263, at 168-69 ("[P]eople care about the image and memories they will leave behind, images in the minds of loved ones that may be soiled by the patient's extreme mental and physical deterioration during the dying process."); Francis, *supra* note 183, at 576 ("[People] have interests in how they will be remembered by others, memories that will surely be affected by the character of their dying process").

267. BARRY A. KOSMIN ET AL., AMERICAN RELIGIOUS IDENTIFICATION SURVEY, at 10 (2001), *available at* http://www.gc.cuny.edu/faculty/research_briefs/aris.pdf.

268. Indeed, the Bible consistently renounces adultery. *See, e.g.*, *Exodus* 20:14 (King James) ("Thou shalt not commit adultery."); *Hebrews* 13:4 (King James) ("Marriage is honorable in all, and the bed undefiled; but . . . adulterers God will judge."). Islam takes a similar view. *See The Qur'ān* 17:32 (Abdullah Yusuf Ali trans., 2001) ("Nor come nigh to adultery: For it is a shameful (deed) [a]nd an evil, opening the road ([t]o other evils).").

be able to understand what the interests are and the consequences of his decision. If our nursing home resident can do this, then he should be considered functionally competent to decide for himself whether the adulterous relationship should continue. If he cannot, then the nursing home should move on to step four.

At this last step, the nursing home should decide whether the value of the intimate relationship to the resident outweighs the value of the critical interests affected. To begin this analysis, the nursing home must assess the value of the intimate relationship. The enormous value of intimate relationships has been discussed earlier in this Article.[269] Some authors go even further and believe that our lives have no meaning without intimate relationships[270] and that our ability to relate is "the defining characteristic of personhood."[271] Given the importance of intimate relationships, especially in a nursing home setting, every possible inference should be made in favor of allowing the relationships to continue. Based on these general principles, we will assume that the adulterous relationship is extremely important to our hypothetical nursing home resident.[272]

The nursing home must next assess the value to the resident of the critical interests set forth above. In determining the value of the critical interests, the nursing home should not simply consider the patient's beliefs when he was competent. Giving precedence to the critical interests formed when he was competent—as Dworkin suggests[273]—gives too much weight to beliefs established before the demented patient knew what his life would be like in a demented state. As previously stated, the able-bodied routinely underestimate the future quality of their lives with a disability and they often find pleasures that they never anticipated.[274] Relying predominantly on prior critical interests binds a person's fate to decisions that may have been formed when he was totally unaware of what his current needs would be.[275]

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269. *See supra* Part II.

270. Harvey, *supra* note 17, at 49 ("[O]ur capacity to engage, both emotionally and cognitively, with other self-consciously aware human beings is what makes a distinctly human life worth living."); Quinn, *supra* note 175, at 901 (arguing that "[t]he meaning and substance of life . . . is found in personal relationships").

271. Quinn, *supra* note 175, at 930 (citing sources); *see also* Koppelman, *supra* note 180, at 81 ("The self cannot develop and cannot be nurtured and maintained without relationships.").

272. According to Jaworska's theories, the resident is also demonstrating a current critical interest in having the relationship continue. *See supra* note 238 and accompanying text. He has a stable relationship and is consistently showing, by his behavior, that it is of value to him. *See supra* note 258. Experiential interests should also be considered in determining the value of the relationship. *See supra* note 237.

273. *See, e.g.*, Harvey, *supra* note 17, at 52.

274. *See supra* notes 200-01 and accompanying text.

275. Stith, *supra* note 195, at 52 (noting that the President's Council on Bioethics criticized advanced directives because they "allow a person to select a specific moment in time in which to record preferences that will dictate that person's fate in a later disabled state . . . [and these] advance directives may not reflect a patient's subsequent desires").

Therefore, in deciding the value of these critical interests to the resident, the nursing home must consider the impact of the demented patient's current condition on the previously formed critical interests. This is much more important in dementia cases than in end-of-life decisionmaking, because the demented patient can live for a long time. Some critical interests are fluid and may be altered significantly based on changed circumstances.[276]

For example, as mentioned above, our hypothetical married resident may have had a critical interest, when competent, in his fidelity to his wife and in protecting her feelings. But the wife's role generally changes when her husband is placed in a nursing home. The married couple usually stops having sexual relations because "[it is] no longer the loving act that they once enjoyed."[277] The wife often begins separating emotionally from her husband as she becomes more of a caregiver than a partner[278] and "there is no longer any reciprocity in the relationship."[279] With respect to our hypothetical married resident, he has demonstrated that his wife is no longer fulfilling his needs for intimacy. If she was, he would not be involved with another resident. Based on these changed circumstances, our hypothetical resident's prior critical interest in his wife's feelings may no longer be a substantial concern.

The resident's critical interest in the memories he will leave behind is also fluid. The family's memories of a demented resident are not as significant a concern as in end-of-life cases. In end-of-life cases, the patients are deciding only how to die, not how to live with a disease. The memories a demented patient can expect to leave behind will be colored by years of living with dementia. His choice may come down to being remembered as a depressed and lonely demented patient, who does not remember his family, or a happier one in an adulterous, but meaningful, relationship with another resident. Again, given these changed circumstances, his prior critical interest in these memories may not be a substantial concern.

The religious beliefs of the patient are perhaps the most difficult critical interest to assess. Our hypothetical married resident may have believed, when competent, that he should be faithful to his religion and that he would commit a mortal sin by engaging in adultery. But even this critical interest will be altered by his demented condition. In all three major religions, if the person is not aware that he is committing adultery, he is, at most, guilty of a minor offense.

Over three-quarters of American adults consider themselves members of the

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276. Examples of critical interests that would not change with dementia might include providing money for a grandchild's education or wanting to provide a pension to a spouse. The character of these identity-defining interests does not change due to the nature of the condition. *See, e.g.*, Harvey, *supra* note 17, at 58-59.

277. Bonifazi, *supra* note 50, at 28.

278. Davies, *supra* note 49, at 6 (noting that the common reasons for spouses to lose interest in sex and physical intimacy include "the patient's inability to identify the spouse or remember the spouse's name, the patient's incontinence or poor personal hygiene . . . , and the change in relationship roles such that the caregiver feels more like a parent than a spouse").

279. Wuest et al., *supra* note 64, at 442.

Christian religion.[280] While there are numerous denominations and widely differing views within each Christian community, theological opinions can largely be drawn into two groups: Catholic and Protestant.[281]

Under the Catechism of the Catholic Church, a "[m]ortal sin requires *full knowledge* . . . of the sinful character of the act [and] of its opposition to God's law."[282] Committing such a sin would be difficult, if not impossible, for a patient suffering from dementia, because the demented patient would lack the mental capacity to knowingly violate the dictates of his religion. A demented patient might be able to commit a venial sin,[283] but both the gravity and punishment of venial sins are significantly less severe.[284]

Protestantism grew out of European Catholicism in the sixteenth century, based on the works of Martin Luther and John Calvin.[285] The Protestant view of sin diverges substantially from Catholicism. For Protestants, sin is not an act, but rather a condition of human existence, a "hereditary depravity and corruption of our nature."[286] Therefore, according to Protestantism, sin is an inescapable reality of human life, neither voluntary nor involuntary. If sin is unavoidable, it would be difficult to measure the critical interest in avoiding it.

After Christianity, Judaism is the second largest religion in the United States.[287] Issues of adultery and Alzheimer's disease have been discussed by Rabbinical scholars throughout the last decade, but the issue is still unresolved.[288] The Rabbinic authorities have, however, addressed the mental requirement of sin. The penalty for a transgression from any "commandment in the Torah . . . if committed wilfully, is *kareth* and, if committed unwittingly, a sin-offering."[289] Here, as in Catholicism, there is a distinction between sins committed intentionally and those committed without knowledge. While both transgressors

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280. KOSMIN ET AL., *supra* note 267, at 12 (presenting statistics that 76.5% of American adults identify themselves as Christians).

281. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, at 59 tbl.73 (2007).

282. *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH ¶ 1859 (2d ed. 1997), *available at* http://www.scborromeo.org/ccc/p3s1c1a8.htm.

283. *Id.* ¶ 1855 (stating that venial sin is sin that "allows charity to subsist, even though it offends and wounds it").

284. *Id.* ¶ 1854 ("Sins are rightly evaluated according to their gravity."); *id.* ¶ 1875 ("Venial sin constitutes a moral disorder that is reparable by charity . . . ."). By contrast, "those who die in a state of mortal sin descend into hell . . . ." *Id.* ¶ 1035.

285. *See* CHRISTOPHER ELWOOD, CALVIN FOR ARMCHAIR THEOLOGIANS 6-7 (2002).

286. JEAN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 251 (John T. McNeil ed., Ford Lewis Battles trans., Westminster John Knox Press 2001).

287. KOSMIN ET AL., *supra* note 267, at 13.

288. *See, e.g.*, Lori Eppstein, *Alzheimer's Can Shake Jewish Principles, Ethicist Says*, JEWISH NEWS WKLY. N. CAL., Feb. 27, 1998, *available at* http://www.jewishsf.com/content/2-0-/module/displaystory/story_id/8115/edition_id/154/format/html/displaystory.html.

289. *Babylonian Talmud: Tractate Yebamoth* 9a, *available at* http://www.come-and-hear.com/yebamoth/yebamoth_9.html.

are "guilty" of the offense, those who commit the sin without knowledge are guilty of a lesser offense and incur a lesser punishment.[290]

With respect to Islam, there are over one million Muslims in the United States.[291] In Islam, sexuality is the sacred act of procreation.[292] Marriage, or *nikah*, "gives sexuality a new significance."[293] The opposite of *nikah* is *zina*, roughly translated as fornication, which is strongly prohibited, to the point of being punishable by death.[294] *Zina* includes several sexual taboos, the most serious of which is adultery.[295] In order for adultery to be punishable, however, the offender must be "of age and possessing normal common sense."[296] While an adulterous act by a demented patient would be discouraged and described as "evil,"[297] it is unlikely that it would be punishable under Islamic Law because the adulterer would lack "normal common sense."

Thus, the critical interest of our hypothetical demented resident in avoiding the religious consequences of adultery are significantly lessened by his demented state. Because he does not know that he is married and having an adulterous relationship, he is significantly less culpable. Indeed, all of his critical interests are diminished due to the effect of dementia on his life.

Because intimacy is so vitally important to demented nursing home residents and because the patient's critical interests in ending the adulterous relationship are likely to be significantly diminished due to the characteristics of dementia, the value of the intimate relationship will generally outweigh the value of the critical interests affected. The nursing home should, therefore, generally allow an intimate adulterous relationship to continue. Of course, there may be circumstances that would cause these critical interests to be given more weight or other factors that would cause this balance to work out differently. Each case must be evaluated on its own merits.

This balancing test can also be used to evaluate other types of adulterous and sexual relationships in the nursing home. For example, suppose a married nursing home resident has multiple short-term sexual relationships with different partners in the nursing home. Assume also that she and her partners apparently enjoy these relationships and that they are safe and nonabusive.[298] Should the

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290. According to the Bible, a "sin offering" is defined as a burnt offering made to atone for one's sins. *Numbers* 15:27-28 (King James). An intentional sin is punishable by expulsion from the community. *Numbers* 15:30-31 (King James).

291. U.S. CENSUS BUREAU, *supra* note 281, at 59 tbl.73.

292. ABDELWAHAB BOUHDIBA, SEXUALITY IN ISLAM 14 (Alan Sheridan trans., Saqi Books 1998) (1975).

293. *Id.* at 15.

294. *Id.*

295. *Id.*

296. S. ABUL A'LA MAUDUDI, THE MEANING OF THE QU'RĀN 301-02 (A.A. Kamal ed., Ch. Muhammad Akbar trans., Islamic Publications Ltd. 1st rev. ed, 1999) (1977).

297. *Id.* at 291.

298. A nursing home would, of course, always have the responsibility to end relationships that are harmful to others.

nursing home discourage or encourage these relationships if the nonresident spouse objects? The short-term relationships would probably have less value to the resident than our hypothetical resident's stable relationship because these short-term relationships would be less likely to have the advantages derived from intimacy. The nursing home would, therefore, have less reason to encourage these relationships. Using the balancing test, the final evaluation would depend on the strength of the critical interests involved.

One of the goals of this Article was to find a very simple test for determining whether to encourage or discourage individual sexual relationships in a nursing home. It was hoped that a simple test would give residents more freedom to enjoy intimate relationships, while protecting the nursing home from liability. But the issue of adultery in the nursing home is not simple, which makes it necessary to weigh the various interests, with special attention to the circumstances of each case.[299] Perhaps this is better than a simple test. The balancing test gives the nursing home guidance on how to evaluate the specific critical interests involved, while still allowing the home to tailor each decision to the unique life story of an individual resident.

CONCLUSION

Most cognitively normal people would choose to die, rather than live with even mild dementia.[300] However, they do not have that choice. Millions of elderly Americans will end up in nursing homes; many will be demented, lonely, and depressed.[301] Society has a responsibility to ensure that the needs of these residents are met. That includes fostering rich lifestyles and making their lives as meaningful and enjoyable as possible. For some residents, intimacy and sex can go a long way towards meeting this goal. For this reason, nursing homes should attempt to meet the residents' sexual needs to the same extent that they support the residents in other areas.[302] This includes evaluating what is best for the resident, even if the resident is engaged in an adulterous relationship in the nursing home and the nonresident spouse objects.

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299. The balancing test also fails to eliminate the problems relating to bias of family members in helping to discern the value of the resident's critical interests. Hopefully, these problems will be somewhat reduced by having the nursing home focus on the specific critical interests involved.

300. Koppelman, *supra* note 180, at 71 ("In a recent study of 'cognitively normal' people, about three-fourths indicated that they would not want life-sustaining treatment . . . if they were mildly demented. And 95% would not want such treatment if they were severely demented.").

301. *See supra* note 16 and accompanying text; *see also* Ritchie & Lovestone, *supra* note 21, at 1763 (noting that "depression occurs in about 40-50% of cases [of dementia]").

302. Berger, *supra* note 19, at 310 ("Generally the [nursing home] should extend itself in the area of sexual quality of life in parallel to efforts to support other areas of resident well-being and dignity."); Sy, *supra* note 84, at 546 (noting that patients have the "'right to have the same level of services regarding their sexual needs and behaviors as with their other areas of development'" (quoting Timothy L. Meeku, Sonoma Development Center Policy 3 (July 1999) (unpublished hospital administrative policy) (on file with Whittier Law Review))).

KATRINA DISASTER FAMILY LAW: THE IMPACT OF HURRICANE KATRINA ON FAMILIES AND FAMILY LAW

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INTRODUCTION

When Hurricane Katrina slammed into New Orleans and spread through the Gulf Coast on August 29, 2005, the city began to flood when the levees broke.[1] As a result, more than a thousand persons died, lives were devastated and almost incalculable losses were suffered.[2] At least 80% of the city's buildings and infrastructures—homes, stores, schools, libraries, police and fire stations, city and state museums, office buildings, hotels, restaurants, highways, bridges, and levees—were totally destroyed.[3] Almost four years after the disaster, the city's population is approximately two-thirds of what it was before Hurricanes Katrina and Rita and the subsequent levee breaches (collectively the Storm).[4] Most of the homes, stores, schools, and infrastructure destroyed in the city's poorer, African-American communities, such as the Lower Ninth Ward, still lay in

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The Authors dedicate this work to all the families who struggle every day in New Orleans to re-build their lives devastated by Hurricane Katrina and those who remain dispersed and displaced in the Katrina Diaspora (the Diaspora comprises the cities and regions across the nation to which several hundred thousand residents of New Orleans were evacuated, and where tens of thousands still remain in temporary or perhaps permanent displacement).

1. *See* John McQuiaid, *Katrina Trapped City in Double Disasters*, TIMES-PICAYUNE (New Orleans), Sept. 7, 2005, n.p., *available at* 2005 WLNR 14616487; David Oshinsky, *Hell and High Water*, N.Y. TIMES, July 9, 2006, at 71.

2. *See* Bob Warren, *Revised Tribute to Storm Victims to Debut: New St. Bernard Slab Fixes Names, Spelling*, TIMES-PICAYUNE (New Orleans), Aug. 24, 2008, at 1, *available at* 2008 WLNR 15928834 (noting that the State "Department of Health and Hospitals has put Katrina's death toll in Louisiana at 1,464").

3. *See* Oshinsky, *supra* note 1 (noting that the storm's surge led to 80% of the city being under water).

4. *Compare* Matt Scalian, *Orleans Population Surpasses 300,000*, TIMES-PICAYUNE (New Orleans), Mar. 19, 2009, at 1, *available at* 2009 WLNR 5172708 (noting that "Orleans continued a strong growth . . . for a 2008 total of 311,000 residents"), *with* Paul Rioux, *St. Bernard Rebound Tops Census: Fastest-growing Parish in Nation Swells by 43%*, TIMES-PICAYUNE (New Orleans), Mar. 20, 2008, at 1, *available at* 2008 WLNR 5381322 (noting a pre-Storm population in New Orleans of 450,000).

ruins.[5]

These unprecedented events precipitated a massive and destructive impact on the people of New Orleans and the surrounding parishes. Importantly, this situation is not over or "fixed"—it very much continues today. While much has been written about the social cost of Katrina and the floods,[6] sparse attention has been given to the Storm's particular impact on women, children, and families. This Article directly addresses the impact that the Storm has had on the families of New Orleans and particularly examines the role of family law, and the local family law courts in attempting to remedy many of the needs and challenges faced by these families.

As attorneys and legal activists who have been working in post-Katrina New Orleans, we have witnessed the impact that the Storm has had on the families of this devastated city. We have seen the physical, social, and economic trauma of families who have returned and those still displaced in cities and rural areas across the nation, in what we call the "Katrina Diaspora." We have interviewed Orleans parish family law judges, advocates for children and families, and talked with and advocated on behalf of dozens of women and children impacted by the Storm. Each day we see the ruins and destruction of this shattered city, the open wounds as evidence of the physical devastation, and the painful, agonizingly slow, uneven rebuilding and recovery process.

Our recognition of the extreme, unprecedented consequences of the Storm on families and family law is therefore based on our experiences, observations, and the personal empathy generated by our living in this post-Katrina reality. This Article is culled from these experiences, observations, and our own advocacy service in post-Katrina New Orleans.

Specifically, the Article discusses the family related legal issues raised by this tragedy, the effect and response of Louisiana family law, and the need for family law reform and protections in the recovery process. While this discussion and exploration is important for all states, parishes, and municipalities impacted by Katrina,[7] the focus of this Article is on the city of New Orleans. From the start, we note with a caution that our work is limited by a paucity of recent official reports, government measures, and statistics that document the relief and

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5. *See* AMY LIU ET AL., BROOKINGS INST. METRO. POL'Y PROGRAM & GREATER NEW ORLEANS CMTY. DATA CTR., THE NEW ORLEANS INDEX, JANUARY 2009: TRACKING THE RECOVERY OF NEW ORLEANS & THE METRO AREA 6, 23 (2009) (noting both a continued "widespread destruction" from Katrina and that the largest demolitions taking place in the "hard hit Lower Ninth Ward neighborhood").

6. *See, e.g.*, DOUGLAS BRINKLEY, THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST (2007); Mollyann Brodie et al., *Experiences of Hurricane Katrina Evacuees in Houston Shelters: Implications for Future Planning*, 96 AM. J. PUB. HEALTH 1402 (2006); James R. Elliott & Jeremy Pais, *Race, Class, and Hurricane Katrina: Social Differences in Human Responses to Disaster*, 35 SOC. SCI. RES. 295 (2006); Carl F. Weems et al., *The Psychosocial Impact of Hurricane Katrina: Contextual Differences in Psychological Symptoms, Social Support, and Discrimination*, 45 BEHAV. RES. & THERAPY 2295 (2007).

7. Katrina directly impacted Florida, Louisiana, Mississippi, and Alabama.

recovery process as it relates to women, children, and families, as well as the extent of the physical devastation, injuries, and loss of life, specifically of women and children, wrought by the Storm.

However, what we know is that the most vulnerable members of the community—children and minors—have likely suffered the most egregious and life-altering harms since August 29, 2005.[8] Children entered the Storm at-risk and endure the aftermath at greater risk. The long-term consequences of Katrina on these children will likely be unprecedented in nature and scope and continue through their lifetimes. It also is likely that women survivors of the Storm, many single parents, poor, and African-American, have played the most enduring and forceful role in reuniting and re-settling their families, and in re-building their communities. Post-Katrina, women kept their family structures together during the dispersal and forced migration from New Orleans in the wake of the Storm.[9] This is consistent with the role that women and mothers have historically played in holding together the social fabric of family and community.

Yet, post-Katrina women and mothers have also been marginalized from decisionmaking in the recovery process and have been victimized by increased domestic violence.[10] They have been largely left to fend for themselves in securing and protecting the welfare of their children, most often without resources, services, and housing all in the worst of circumstances.[11] When women suffer and are victimized, the entire family is affected—children, grandparents and other kinship care providers, siblings, and spouses. Therefore, this Article addresses the current impact and long-term consequences of Katrina on families and family law through the perspective of Katrina's impact on women and children.

Part I of this Article addresses the complex and unique contextual and demographic setting that defined New Orleans when the Storm hit and the changes that have occurred in the Storm's aftermath. First, we posit that the overlay of this analysis must be rooted in viewing Katrina disaster family law as a social justice issue. Next, we present the demographics and social structure of affected families living in the city before the Storm. We also explore the particular role of women—mothers, grandmothers, aunts, and other female kinship caregivers—from the time Katrina hit through to the current recovery period.

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8. Olivia Golden, *Young Children After Katrina: A Proposal to Heal the Damage and Create Opportunity in New Orleans*, *in* AFTER KATRINA: REBUILDING OPPORTUNITY AND EQUITY INTO THE *NEW* NEW ORLEANS 37, 37-39 (Margery Austin Turner & Sheila R. Zedlewski eds., 2006) (discussing the severe and varying impacts on New Orleans' children).

9. *See, e.g.*, Press Release, Ms. Found. for Women, Stories of Women's Hope, Activism and Leadership Across the Gulf Coast (Aug. 28, 2006), *available at* http://www.ms.foundation.org/wmspage.cfm?parm1=375.

10. *See* Pamela Jenkins & Brenda Phillips, *Domestic Violence and Disaster*, *in* KATRINA AND THE WOMEN OF NEW ORLEANS 65, 65-68 (Beth Willinger ed., Dec. 2008) (noting the post-Katrina rise in domestic violence and the decrease in available services for women affected by such a rise).

11. *Id.* at 68.

In Part II of the Article we discuss the various key ways in which *traditional* family law issues and the civil justice system have helped and hindered families affected by the Storm. Part II addresses the role of family law in each of the Storm's four successive episodes.[12] The key traditional family law issues we address are the post-Katrina dramatic rise in divorces, the escalation of domestic violence, and the myriad legal issues affecting children. These issues include relocation matters, post-Katrina evaluation of prior custody orders, and the need to educate parents on the use of medical consent and other powers-of-attorney type documents. In addition, we evaluate and discuss progressive Louisiana statutes in place pre-Katrina that provide for protections, services, and benefits to kinship care providers of minors. Part II also addresses the question of whether the Louisiana State legal system and the collaborative social service agencies supported the traditional kinship care arrangements so prevalent in New Orleans pre-Katrina.

Part II further discusses the temporary displacement of children amidst the chaos of Katrina, the trauma children experienced while in the torrid, chaotic, and physically dangerous conditions of the Superdome and the Convention Center during the Storm, and the inter-agency conflicts across state, local, and federal jurisdictions that hampered authorities in immediately protecting every single child of the Storm. We also address Child Support enforcement and the ability of the courts to deal with modification of orders based on the changed circumstances of so many persons impacted by the storm, as well as relocation matters stemming from displacement of so many families and parents.

Finally, we turn to the less traditional and evolving family law issues and the lessons learned from the Storm's impact on non-traditional family law issues. These include family law protections in the face of disasters for same-sex couples and same-sex headed families with children.

As we address in turn the issues of divorce, domestic violence, child custody and collateral issues, and non-traditional family arrangements, we analyze the following questions for each area of law: (1) Was there a rise or decline in this type of case and how did the existing Louisiana State Civil Code help or hinder families post-Katrina?; (2) In what ways have the courts and judges been flexible in applying existing laws after the Storm and did the legislature revise or adopt any new family laws to meet the legal needs and challenges post-Katrina?; (3) What further law reform is needed and, in particular, what legal mechanisms and rights should be created to support both those displaced families who want to return to New Orleans and also those who decide not to return?

In this way, this Article argues that it is a priority of the recovery process for the legal system, Louisiana State law, and the courts to affirmatively protect those families with children who still are displaced in the Katrina Diaspora. These displaced families need special and unprecedented assistance and advocacy so that they can return to New Orleans, *if that is their choosing*, to

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12. The four successive episodes of the Storm are: (1) the hurricanes and the subsequent flooding, (2) the forced migration out of New Orleans (the Katrina Diaspora), (3) the post-Storm "relief," and (4) the current "recovery." *See infra* Part I.B.

rebuild their lives and their homes, and to secure a safe, healthy, and secure future for their children. To ultimately accomplish this also will require federal intervention in the form of financial assistance, additional legal protections, and federally led recovery efforts that are not yet realized.

Although this Article focuses primarily on the disaster of Katrina and its aftermath, throughout the Article we offer proposals for all jurisdictions to consider in preparing for and mitigating the extreme loss, trauma, and displacement of families caused by both natural and unnatural disasters, as experienced by families in New Orleans. With emergency preparedness plans and policies in place, courts and judges will be in a better position to play a positive role in minimizing family disruption and trauma both during and after a disaster like Katrina. This approach challenges the traditional notions of the role of family law and family courts as guardians of the status quo within an essentially adversarial paradigm. Indeed, the system of family law, including the courts, social services, the law, and public policy, has a unique and compelling role to play as a support network and catalyst for families who survive a disaster to reunite, regroup, and rebuild together. Indeed, family law can and should serve as a part of the healing and restorative process for the families discussed in this Article—in the recovery and in bringing families a measure of social justice in the face of this unprecedented disaster.

This is easier espoused than accomplished, particularly if the lessons of Katrina, as it affected the justice system itself, are not embraced in jurisdictions around the nation. Katrina, in nearly destroying the city of New Orleans, also had a profound effect on the judicial system itself and the functioning of the *rule of law*. The courts, the judges, their ongoing proceedings and trials, the prisoners, petitioners, and defendants all were deeply affected. Court buildings and the Orleans Parish Jail were flooded, and some structures and court records were severely damaged or destroyed.[13] While the civil and criminal systems are functioning at this point, nearly four years after the Storm, the judicial system still faces numerous challenges.

In short, Katrina affected the state and parish court systems in unprecedented ways creating a total and prolonged judicial state of emergency. As one Orleans Parish judge said, "Nothing on this scale has ever happened in this country—unlike the terrorist attacks in New York and Washington, D.C. on September 11, 2001—Hurricane Andrew and other huge disasters, like Katrina, the authority to fix the disaster was itself in the disaster."[14] Judges themselves had to evacuate the city, many for weeks and months, many lost their homes and all possessions, their children's schools were closed. One judge even was stranded on his rooftop during the storm and its aftermath for over four days.[15] Yet they struggled to maintain the rule of law, manage the courts and judicial system, and protect peoples' rights in the face of the disaster, total chaos, and

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13. Interview with the Honorable Madeleine Landrieu, Judge, Orleans Parish Civil Dist. in New Orleans, La. (May 16, 2008) [hereinafter Judge Landrieu Interview].

14. *Id.*

15. *Id.*

dislocation.

Surely, court administrators, judges, and corrections officials around the nation have much to learn from the lessons culled by the authorities of Louisiana and, in particular, those of Orleans Parish. Therefore, while our focus in this Article is on Louisiana family law and the domestic law courts in Orleans Parish (the city of New Orleans), most of the family law issues of relocation, custody, foster care, and domestic violence, among others, are universally applicable to other jurisdictions across the country.

Our hope in shedding light on what we call "disaster family law," as understood from Katrina's almost incalculable impact, is that other jurisdictions will now evaluate and reform their family law procedures, practices, and codes to meet the enormous challenges of disasters that may occur in the future. Emergency preparedness planning by the courts and judicial system is indeed a pressing matter in order for the rule of law to survive intact during future disasters wherever they may occur. There is also a compelling need for every State to examine and, if necessary, reform its parental kidnapping and jurisdiction laws. Nationally applicable model acts will also require examination and reform so that they help to protect families and children in the face of future disasters and family displacements.

I. THE BACKSTORY: NEW ORLEANS—THE CITY THAT CARE FORGOT[16]

A. Bringing Families Home to New Orleans—Katrina Disaster Family Law as a Social Justice Issue

Analyzing the Storm's impact and the legal needs of the families of New Orleans—specifically focusing on families with children—is best understood in the context of the overall challenge to rebuild the city and to have its former residents return home. From this viewpoint, the impact of Katrina—the storm and its aftermath—on families presents one of the most compelling social justice issues of our time. Closely tied to this crisis are the historic roles of race, poverty, and gender disparities and discrimination in New Orleans, as described in the following sections. A true test of the effectiveness of the law and the judicial system as they have responded to the family law issues raised by the Storm must be measured against the pre-Katrina status and needs of the underserved, under-represented, and basically disenfranchised populations in New Orleans.

Today, there are few measures or consistent estimates of how the city will look in the next decade and beyond. There is no single definitive report on how

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16. *See* DR. JOHN AND THE LOWER 911, *City That Care Forgot*, *on* CITY THAT CARE FORGOT (BMI Records 2008) ("Been blown down to New Orleans/On the winds of despair/Where music and laughter/Once filled the air/I saw the great vacant ghost/Of a politician's stare/In the City that care forgot/Everything sacred been strung up and shot/In the City that care forgot/Uptown everything looks fine/When you head downtown/You see the water line so high/When you get down to the Lower 9/The smell of Death still hangs/On the honeysuckle vine/Magnolias lie in the streets/In the City that care forgot.")

long the recovery and rebuilding process will take and how much of New Orleans' pre-Katrina population will return to their city. We write this article in the midst of great uncertainty and widely conflicting reports, approaches, and projections about the future of this once vibrant and culturally diverse city. However, we believe that the future of the city and, more specifically, whether or not families will return to New Orleans depends on a variety of factors that are essentially measures of social justice.

Components of the social goal of rebuilding and revitalization include: (1) how the city's infrastructure, including perhaps most importantly, how the levees are rebuilt; (2) whether schools and housing are rebuilt and revitalized; (3) what types of jobs and employment are made available to potential residents; (4) what financial and social service support systems and incentives governments will provide. At the same time, the pre-Katrina social, economic, and racial barriers[17] must be addressed. The goal is clearly not to have people return to the pervasive poverty, unemployment, substandard and blighted housing, failing schools, and racial segregation that in large part characterized pre-Katrina New Orleans.[18] Yet, this was a city that people loved and were committed to in ways that are unique in the American experience. The people—and families—who lived in New Orleans pre-Katrina and were displaced by the Storm must have both the *right* to choose whether to return or not to New Orleans, and the *ability* to return and re-build their homes and lives in this city, if they so choose.

The bottom line is that there will be no real recovery unless and until the families of New Orleans—families across the social, economic, and racial spectrums[19]—can and do safely return to the city. If large numbers of families do not return because they cannot return, the city will exist, but it will not be the same New Orleans. In other words, the city will be a tourist destination, a convention and casino center, but not a diverse and growing American urban center of the twenty-first century. The protections of family law and the courts are an important part of this framework for recovery, that is, of making the *right to return* a reality for the families of New Orleans.

B. New Orleans Families—Family Life Pre-Katrina and During the Disaster's Four Stages

Hurricanes Katrina and Rita, coupled with the levee breaches, triggered four episodes of trauma and destruction. All four episodes are actually essential components of the Storm itself, which is of an evolving and ongoing nature, rather than a one-time determinative occurrence. That is, in fact, how the people of New Orleans, both those who have returned and those still displaced

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17. For a discussion and overview of the pre-Katrina social, economic, and racial barriers, see Sheila R. Zedlewski, *Pre-Katrina New Orleans: The Backdrop*, *in* AFTER KATRINA: REBUILDING OPPORTUNITY AND EQUITY INTO THE *NEW* NEW ORLEANS 1, 1-7 (Margery Austin Turner & Sheila R. Zedlewski eds., 2006).

18. *See id.* (discussing the City of New Orleans pre-Katrina).

19. *See id.* (providing a cross-sectional view of the demographics in New Orleans before Katrina).

elsewhere, experience these historic and transformative events.

First was the initial period of natural and unnatural disasters themselves, that is hurricanes Katrina and Rita and the breaking of the levees, followed by the massively destructive flooding of New Orleans[20]—the Storm. This was immediately followed by the creation of the Katrina Diaspora when over a million people were immediately forced from their homes and prevented from re-entering the city and the surrounding parishes.[21] Following the immediate destruction and dispersal of the population was the period of post-storm relief. This period of post-Storm relief led to the current recovery, itself a halting and seriously flawed process that by some estimates will likely continue for several decades.[22]

During each of these four inter-related Katrina episodes—Storm, Diaspora, relief, and recovery—the city's most vulnerable populations suffered the most serious and ongoing impact. These highly impacted groups included children, the elderly and disabled, women, and institutionalized persons housed in prisons, nursing homes, and hospitals when the Storm hit.

This reality reflects the ways in which other social crises have affected society's most vulnerable. The AIDS epidemic, drug addiction, crime and gun violence, imprisonment and, in other countries, war and military invasion, have devastated these targeted populations that can least protect themselves in similar ways.[23] However, in the case of New Orleans, the Storm's devastation also exacerbated the long-term effects of existing social injustices caused by decades of urban blight and neglect, a failed public school system, and concentrations of extreme urban poverty.[24] By the time Katrina hit the city, the reality of life for the majority of its residents—primarily poor African Americans—was marked by deeply embedded poverty, racial discrimination, and segregation that had long

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20. *See* McQuaid, *supra* note 1 (noting the "double disaster" of storm surge waters followed by the breaking of the levees); Oshinsky, *supra* note 1 (noting that "Katrina's storm surge overwhelmed the levees").

21. BRUCE KATZ ET AL., BROOKINGS INST. POL'Y PROGRAM, HOUSING FAMILIES DISPLACED BY KATRINA: A REVIEW OF THE FEDERAL RESPONSE TO DATE, Nov. 11, 2005, at 1 (citing Blaine Harden & Shankar Vedantam, *Many Displaced by Katrina Turn to Relatives for Shelter*, WASH. POST, Sept. 8, 2005, at A1).

22. *See* Joel Eagle, Note, *Divine Intervention: Re-examining the "Act of God" Defense in a Post-Katrina World*, 82 CHI.-KENT L. REV. 459, 487-88 (2007) (noting that the environmental cleanup alone may take years if not decades).

23. For discussion of the ways in which these social crises have affected society's most vulnerable, see Justin Brooks & Kimberly Bahna, *"It's a Family Affair"—The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 277-85 (1994) (noting the effects of incarceration and crime on families, especially the impact on children); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 625-34 (1993) (discussing the effects of war on women); Susan L. Waysdorf, *Families in the AIDS Crisis: Access, Equality, Empowerment, and the Role of Kinship Caregivers*, 3 TEX. J. WOMEN & L. 145, 177-88 (1994) (discussing the impact of AIDS).

24. For a picture of pre-Katrina New Orleans, see generally Zedlewski, *supra* note 17.

defined the social structure and fabric of the city.

1. Family Demographics in Pre-Katrina New Orleans.—The pre-Katrina social fabric for families in New Orleans was set within the context of one of America's most culturally unique and diverse cities. New Orleans was known to be rich in a heritage of music, architecture, languages, food, and celebrations. Its economy was based on the tourism industry that brought thousands to the city each year for conventions, music festivals, and Mardi Gras celebrations. However, at the same time, New Orleans was one of the poorest and most racially segregated cities in the United States.[25] Before Katrina, New Orleans had an extremely high poverty rate, high unemployment, and completely failed and decrepit schools.[26]

Due to a long history of racism running through the heart of its urban development, most of the city's poorest and most heavily African-American communities were situated below sea level,[27] vulnerable to hurricanes and a flawed levee system. This endemic poverty, unemployment, and systemic segregation had the greatest impact on families with children. Viewed in this context, the need for government agencies and political and civic leaders to do everything possible in order for families to return safely to the city—to quality housing, good-paying jobs, health care, and schools—is a major priority.

Most of the city's population was forced out of the city by the Storm.[28] Floodwaters unleashed by the breaking of the levees, in the immediate wake of Katrina's storm surge, "destroyed the majority of housing in New Orleans and uprooted over 80% of its [pre-Katrina population of approximately] 450,000 citizens."[29] Almost four years after the Storm, just over two-thirds of the city's pre-Katrina population has returned.[30]

While several primarily white and middle to upper-class neighborhoods were devastated by the floods, the majority of the destroyed neighborhoods were disproportionately populated by poor or low-income and African-American people, most notably in the Ninth Ward, Lower Ninth Ward, Gentilly, Mid-City, as well as the African-American working and middle-class neighborhood of New Orleans East.[31] Katrina and the floods destroyed thousands of homes, businesses,

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25. *See* WILLIAM H. FREY & DOWELL MYERS, POPULATION STUDIES CTR., RACIAL SEGREGATION IN U.S. METROPOLITAN AREAS AND CITIES, 1990-2000: PATTERNS, TRENDS, AND EXPLORATIONS 11-17 (Apr. 2005), *available at* http://www.psc.isr.umich.edu/pubs/pdf/rr05-573.pdf (discussing the racial segregation present in New Orleans).

26. Zedlewski, *supra* note 17, at 1.

27. *See id.* at 3 (noting the racial make-up of New Orleans and showing in figure 1.1 the flooded areas as coupled with deep poverty).

28. *Id.* at 1 (noting that the flood "uprooted over 80[%] of [New Orleans's] 450,000 citizens").

29. *Id.*

30. *See supra* note 4 and accompanying text.

31. THOMAS GABE ET AL., CONG. RESEARCH SERV., HURRICANE KATRINA: SOCIAL-DEMOGRAPHIC CHARACTERISTICS OF IMPACTED AREAS 16 (2005) ("The hurricane's impact on New Orleans also took a disproportionate toll on African Americans. An estimated 310,000 black people

and jobs, along with many of the city's schools, hospitals, and community assets. Structures that were not destroyed sustained serious damage.

Before Katrina, the city consisted predominately of poor, African-American persons—comprising 68% of the population, compared to whites at 28% of the population.[32] A majority of the city's children were living in single-mother households; in 2004, a year before the Storm, "[62%] of New Orleans' children lived with a single parent . . . , compared with . . . 31[%] of all children in the United States."[33] At the same time, "70% of all births in the [year before Katrina] were to unmarried women, compared with 47[%] in Louisiana and 29[%] in the United States."[34] Relative to the rest of Louisiana and the nation, however, New Orleans had a lower percentage of families with children. "Only one-quarter of the city's households had children under age [eighteen], compared with about one-third of households in the state and the nation."[35]

Pre-Katrina, New Orleans poverty was pervasive and severe for a majority of the population, largely African-American.[36] In the decades immediately prior to Katrina, the city experienced white flight to the suburbs, increased unemployment rates, and lowered population overall.[37] The child poverty rate in New Orleans "was the highest in the nation."[38] The general poverty rate in New Orleans ranked it eighth nationally among cities of its size.[39] The total family income in New Orleans was 67% of that for the United States generally; for families with children in New Orleans the annual income was only 58% of the national average.[40]

All of these factors—the high percentage of single-parent families, high unemployment, and very low family incomes—added up to the city's overall very high poverty rates. The impact on families with children was particularly acute. Pre-Katrina, 38% of children under age eighteen lived in poverty in New Orleans—twice the national average.[41] Child poverty was also highly concentrated in certain geographically defined areas, such as the Lower Ninth

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were directly impacted by the storm largely due to flooding in Orleans Parish. Blacks are estimated to have accounted for 44% of storm victims.").

32. Census Bureau 2000, State & County Quick Facts: New Orleans, http://quickfacts.census.gov/qfd/states/22/2255000.html (last visited Aug. 20, 2009).

33. Zedlewski, *supra* note 17, at 3.

34. *Id.*

35. *Id.*

36. *See id.* at 5-7.

37. *See* BRINKLEY, *supra* note 6, at 28 (noting "massive 'white flight'" beginning in the 1960s); *see also* Harold A. McDougall, *Hurricane Katrina: A Story of Race, Poverty, and Environmental Injustice*, 51 HOW. L.J. 533, 540-44 (2008) (discussing the racial factors involved in the problems before and after Katrina including the decades of "white flight").

38. Zedlewski, *supra* note 17, at 3 (citing ANNIE E. CASEY FOUND., 2005 KIDS COUNT DATA BOOK: STATE PROFILES OF CHILD WELL-BEING 95 (2005)).

39. *Id.* (citation omitted).

40. *Id.* at 4-5.

41. *Id.* at 6, tbl. 1.3 (noting poverty statistics derived from the 2000 Census).

Ward.[42] Before the Storm hit New Orleans, approximately 39,000 children under the age of six lived in New Orleans and of these almost 40% lived in poverty.[43] In the high-poverty communities, the average household income was approximately $20,000 and "four out of five children were being raised in single-parent families."[44] Moreover, in these areas, "two in five working-age adults were jobless."[45] In fact, "[a]lmost half of the poor households in New Orleans [pre-Katrina] lived in these high-poverty [neighborhoods]."[46]

Due to this extreme poverty, families with children also had very few assets. So many families did not own or have access to cars—fully one-third of African-American residents[47]—that they were unable to evacuate the city on their own.[48] As a result, they likely ended up in the now infamous squalor and life-threatening conditions of the New Orleans Superdome and Convention Center. Eight percent of poor families in New Orleans did not have telephone service so they could not call out to seek help or make evacuation plans.[49] The fact that local, state, and federal agencies abandoned these families, which included many children and elderly, by not caring for or undertaking their evacuation is now a part of the infamous legacy of the Storm.

Commonly, the greatest asset and largest investment for most people across the nation is ownership of their homes.[50] Home ownership is also an indication of the family's overall financial stability and strength and serves as a tie to the community.[51] Overall, the rate of home ownership in pre-Katrina New Orleans was relatively low, compared to the rest of the nation, and some of the areas most heavily damaged by Hurricane Katrina had a lower than average proportion of homeowners.[52]

The realities of home ownership and the dynamics of race and poverty in pre-Katrina New Orleans were characterized by a complex set of factors. Estimates indicate that 55% of 278,000 households impacted by Katrina were owner

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42. *See* Susan J. Popkin et al., *Rebuilding Affordable Housing in New Orleans*, *in* AFTER KATRINA: REBUILDING OPPORTUNITY AND EQUITY INTO THE *NEW* NEW ORLEANS 17, 18-19 (Margery Austin Turner & Sheila R. Zedlewski eds., 2006) (noting the demographics of the Lower Ninth Ward including, as show in table 3.1, a 41% child poverty rate).

43. Golden, *supra* note 8, at 37.

44. Zedlewski, *supra* note 17, at 5.

45. *Id.*

46. *Id.*

47. Alan Berube & Steven Raphael, Brookings Inst. Metro. Pol'y Program, *Access to Cars in New Orleans*, tbl. 3 (2005), *available at* http://www.brookings.edu.

48. *See id.*; *see also* MAYA WILEY ET AL., CTR. FOR SOC. INCLUSION, TRIUMPH OVER TRAGEDY: LEADERSHIP, CAPACITY AND NEEDS IN ARKANSAS, ALABAMA, GEORGIA, LOUISIANA, AND MISSISSIPPI AFTER HURRICANES KATRINA AND RITA 7 (2007); Zedlewski, *supra* note 17, at 7.

49. Zedlewski, *supra* note 17, at 7.

50. GABE ET AL., *supra* note 31, at 22.

51. *Id.* at 22-23.

52. *Id.* at 23.

occupied.[53] However, in some of the city's poorest neighborhoods, such as the Lower Ninth Ward, homeownership rates actually were higher than the national average.[54] The relatively high homeownership rates were a uniquely New Orleans characteristic of life, especially for the large sector of the African-American population that lived in deep poverty. Across the city, the percentage of home owners who lived in their homes and carried mortgages in the years just before the Storm was relatively low—65%.[55]

In addition, pre-Katrina homeownership data indicate that many owners had lived in their homes for many years.[56] This reflects the uniquely New Orleans emphasis on strong community ties and generational continuity, especially within some of the city's poorest neighborhoods. More than 50% of all homeowners in pre-Katrina New Orleans lived in their homes for twenty years or more compared to only 42% nationally.[57] Just under 33% had lived in their homes for thirty years or more compared to only 22% nationally.[58] Even among renters in pre-Katrina New Orleans, strong community ties were evident "with 29% having lived in their [rented] homes for [10] years or more" compared to only 23% nationally.[59]

Yet, despite the relatively low transient rate and high home ownership rates in neighborhoods of high-poverty concentration, poor families with children experienced dire, if not extreme, economic hardship. Among poor families, one in five suffered from food insecurity and hunger.[60] Economic hardship was coupled with poor housing, lack of quality early education programs, quality health care, and other factors that placed the majority of New Orleans' children at high risk.[61] These children were growing up with only one parent, usually their mother, or with a kinship care provider, like their grandmother.[62] They lived in fear of crime, had few, if any, social and financial supports, lived in substandard, blighted housing in segregated neighborhoods, lacked sufficient health care, and went to school in one of the nation's worst and failing school systems.[63]

Before Katrina, Louisiana ranked forty-ninth overall in a national survey assessing the well-being of children.[64] This assessment was based on a variety

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53. *Id.* at 24.

54. Zedlewski, *supra* note 17, at 6-7 (noting 60% homeownership).

55. GABE ET AL., *supra* note 31, at 23.

56. *Id.* (noting that half of homeowners had lived in their homes for twenty or more years).

57. *Id.*

58. *Id.*

59. *Id.* at 23-24.

60. Zedlewski, *supra* note 17, at 7 (citing MAXIMUS, INC., REPORT TO THE STATE OF LOUISIANA: COMPREHENSIVE NEEDS ASSESSMENT OF LOW-INCOME FAMILIES IN LOUISIANA (2002)).

61. *See id.*

62. *See id.* (noting that "[m]ost young children were growing up with only one parent").

63. *See id.*

64. Golden, *supra* note 8, at 37 (citing ANNIE E. CASEY FOUND., *supra* note 38, at 95).

of factors from birth through adolescence.[65] Among these factors, Louisiana was tied for the worst in infant mortality rates.[66] In addition, before the Storm on a state-wide basis social programs such as health care, childcare, nutrition programs, and early childhood education—for example Head Start and Early Head Start programs—were all severely lacking.[67]

Within this very bleak landscape of life in pre-Katrina New Orleans, a unique and vibrant arts and music culture, much of which stemmed from these same impoverished African-American communities, not only thrived, but received wide-spread recognition. Indeed, this special legacy brought fame, appreciation, and respect to the city from people around the nation and the world. This was the reality when Katrina hit the city on August 29, 2005.[68]

2. Families Struggle to Stay Intact as Katrina Hits and the City Floods—The Post-Storm Evacuation and Creation of the Katrina Diaspora.—The deadly and catastrophic hurricane, the unprecedented flooding of the city, and official government negligence[69] left many of New Orleans' poorest and most vulnerable in the dire and dangerous conditions of the Superdome and Convention Center. Thousands of the city's most unfortunate were left starving, frantic, traumatized, and even dying at these chaotic, dangerous sites.[70] One result of the botched evacuation, the failure of local and federal agencies to protect the city's residents, and the resulting massive fiasco at the Superdome was that some children, including young children and infants, were separated from their parents or caregivers during the chaos.

The Kaiser survey reported that 40% of those interviewed upon arrival at the Houston Astrodome were separated from immediate family members (but knew their whereabouts), and 13% were actually separated and did not know the missing family members' whereabouts.[71] Of adults with children, 22% of those surveyed said that none of their children were with them in the shelter.[72] Only estimates exist as to the total number of children who were separated from their parents or caregivers during the chaos of the flawed evacuation process, the

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65. *Id.* (citing ANNIE E. CASEY FOUND., *supra* note 38, at 95).

66. *Id.* (citing ANNIE E. CASEY FOUND., *supra* note 38, at 95).

67. *See id.* at 37-38.

68. McQuaid, *supra* note 1; Oshinsky, *supra* note 1.

69. For perspectives and discussion of the government's negligence, see generally Faith J. Jackson, *A Streetcar Named Negligence in a City Called New Orleans—A Duty Owed, a Duty Breached, a Sovereign Shield*, 31 T. MARSHALL L. REV. 557 (2006); Tarak Anada, Comment, *The Perfect Storm, an Imperfect Response, and a Sovereign Shield: Can Hurricane Katrina Victims Bring Negligence Claims Against the Government?*, 35 PEPP. L. REV. 279 (2008).

70. *See* Adam Nossiter, *2 Million Flee Hurricane's Path; GOP Cuts Convention Events: A Historic Exodus*, N.Y. TIMES, Sept. 1, 2008, at A1 ("There was no sign that the disaster of 2005—when thousands were left stranded in misery for days and 1,600 people were killed, many of them elderly—would be repeated.").

71. WASH. POST, KAISER FAMILY FOUND. & HARVARD UNIV., SURVEY OF HURRICANE KATRINA EVACUEES 9 (2005).

72. *Id.* at 16; *see also* Golden, *supra* note 8, at 39.

shelter experience, and the final evacuation out of the city. Some number of children who were separated from family became wards of the receiving states's child welfare agencies.[73]

Clearly, children were profoundly affected, along with their parents and other family members, in ways that will take years to fully evaluate. Certainly, the effects will continue to be felt for many years to come. Despite the enormity of the disaster, official documentation of what actually happened to families during the Storm is sparse. There exists scant documentation of the exact numbers of evacuees, those in the Superdome and abandoned at the Convention Center, and the numbers and locations of persons who were ultimately displaced outside of the city. Yet the numbers are undoubtedly historic for displacement within the borders of the United States. Within a week after Hurricane Katrina and the floods, more than one million Gulf Coast residents had been displaced from their homes.[74] Of the displaced, some 378,000 were from New Orleans[75] and up to 645,000 people were from areas throughout Louisiana.[76]

There also are few reports as to the specific numbers of children who were stranded on rooftops; drowned in the floods; separated from their parents, kinship care providers, or foster parents; brought to the Superdome and the Convention Center; and ultimately dispersed into the Katrina Diaspora.[77] However, in order to fully understand the family law issues now facing these families, the following estimates and conclusions are instructive.

Some experts have suggested that young children from poor families were likely a disproportionately high component of those who spent time in the Superdome under the now infamously horrendous and dangerous conditions.[78] These were children whose caregivers at the time the Storm hit were least likely to have been evacuated before the flood and who lacked the financial means and ability to leave the city on their own.[79] Quite simply, the city's poorest children were left behind in Katrina's wrath. In the Superdome and at the Convention Center, children likely witnessed violent crimes, got hurt themselves or took ill, and lacked food, water, and sanitation; in the chaos, many also were separated from their families and other caregivers.[80]

The Federal Emergency Management Administration (FEMA) estimates that approximately 200,000 to 270,000 evacuees from across the Gulf Coast region,

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73. Golden, *supra* note 8, at 39.

74. Katz et al., *supra* note 21.

75. Peter Whoriskey, *Katrina Displaced 400,000 Study Says: New Orleans Becomes Whiter, Mississippi Coast More Diverse*, WASH. POST, June 7, 2006, at A12.

76. GABE ET AL., *supra* note 31, at 1 (noting in the summary an estimate of 645,000 displaced residents from Louisiana).

77. A detailed reporting of the numbers of families sheltered and thorough coverage of the effects on those families, particularly those families with children, is beyond the scope of this Article.

78. Golden, *supra* note 8, at 38.

79. *Id.*

80. *See id.*

including New Orleans, were likely living in large shelters during the height of hurricanes Katrina and Rita.[81] Estimates vary as to the number of persons who were in the Superdome, but likely 20,000 to 27,000 people were "housed" in the Superdome at the height of Hurricane Katrina and the flooding of the city.[82] If the combined evacuee population of these shelters from across the Gulf Coast contained the same percentage of young children (under the age of six) as the general population living in poverty pre-Katrina, then "about 20,000 children under the age of [six] spent time in a shelter after the [S]torm."[83]

If older children between the ages of six and eighteen are added to this estimate, then the number of total minors who may have been in the combined Katrina shelters across the Gulf Coast would likely double to 40,000, or more. The full impact of this disaster experience on minors is yet to be fully studied or reported. However, child welfare experts like Olivia Golden conclude that shelters, and particularly the Superdome/Convention Center experience, have posed particularly damaging, highly-dangerous, and long-lasting effects on children of all ages.[84]

The Kaiser Family Foundation surveyed the direct health impact on adults who experienced the dangerous conditions at the Superdome and other large Katrina shelters in New Orleans.[85] Infectious diseases, such as TB and HIV infection, mental health challenges, and other immediate and longer-lasting health conditions likely resulted from these conditions.[86] One can conclude that the extreme trauma, as well as the health threats and conditions of these shelters, had an even harsher impact on the most vulnerable, the children, elderly, and

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81. *Id.*

82. Despite the historic proportions of the catastrophic events at the Superdome, sparse official reporting or documentation of what occurred has been released. Estimates vary as to the actual number of persons who were in the Superdome from the start of the Storm to the final evacuation of the Dome, after the flooding occurred. Some have reported that at the height of Hurricane Katrina itself some 10,000 people initially took shelter in the Superdome. Then, once the levees broke and the city flooded, more than 20,000 people with no other recourse or assistance made their way through the floodwaters to the arena and crammed into the Superdome. Judge Landrieu Interview, *supra* note 13; *see also When the Levees Broke: A Requiem in Four Acts* (HBO documentary and Spike Lee Joint 2006). For a range of numbers in the Superdome, see, for example, DAVID L. BRUNSMA ET AL., THE SOCIOLOGY OF KATRINA 100-01 (2007) (citing Joanne Nigg et al., *Hurricane Katrina and the Flooding of New Orleans: Emergent Issues in Sheltering and Temporary Housing*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 113-28 (2006)); *cf.* BRINKLEY, *supra* note 6, at 275 (noting range of 10,000 to 25,000).

83. Golden, *supra* note 8, at 38.

84. *Id.* at 38-39.

85. WASH. POST, *supra* note 71, at 10 (asking survey participants if they had experienced health problems as a result of the Storm and the severity of such problems).

86. *See, e.g.*, Ctrs. for Disease Control and Prevention, *Tuberculosis Control Activities After Hurricane Katrina—New Orleans, Louisiana, 2005*, 296 J. AM. MED. ASS'N 275, 275-76 (2006) (discussing the TB outbreak concerns caused by Katrina).

disabled.[87]

3. Families Struggling for the Right to Return—Rebuilding and Reuniting Families In Post-Katrina New Orleans.—For tens of thousands, post-Katrina life, after the shelters and evacuation, meant living in the now infamous and toxic FEMA trailers.[88] In the first months following the Storm, people and families were housed temporarily in Red Cross shelters, subsidized hotel rooms, and even cruise ships.[89] For many families, stability has not returned and children continue to experience the extreme anxiety, frustration, anger, and depression experienced by their parents. In July 2006, nearly a year after the storm, 73,214 FEMA trailers were in use throughout Louisiana.[90] The number has steadily decreased since then, as FEMA has been reclaiming the 250 square foot trailers.[91] In addition, while many suspected the ill effects of these trailers, the U.S. Centers for Disease Control finally released evidence that the trailers were toxically contaminated by formaldehyde.[92]

By December 4, 2008, 5769 FEMA trailers still remained in use throughout Louisiana.[93] FEMA set an end date of May 1, 2009 for reclaiming all trailers in the group sites.[94] Surely, this development will dramatically increase the number of people who are homeless, already an epidemic, throughout the surrounding parishes and the Gulf Coast, but particularly in New Orleans. The stark, yet obvious, reality is that when families become homeless, as many have post-Katrina, the children in that family become homeless as well. For months in 2008, many families lived in the Tent City under the I-10 over-pass,[95] and others have been squatting in the ruins of former houses destroyed by the Storm.[96]

The issue of housing families displaced by Katrina and the floods, as discussed further below,[97] remains a critical humanitarian, social, economic, political, and legal problem today, nearly four years after the Storm. A myriad of complex public policy and legal questions which affect these families have arisen from the aftermath of Katrina. Such issues include (1) whether low-

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87. *See* Golden, *supra* note 8, at 38-39.

88. *See* LIU ET AL., *supra* note 5, at app. 25, tbl. 22 (noting that by July 2006, approximately 76,000 people were living in travel trailers or mobile homes, many of which were FEMA trailers).

89. *See id.* at 2-3.

90. *Id.* at app. 25, tbl. 22.

91. *See id.* (noting only 5769 travel trailers active in December 2008).

92. *See* CTRS. FOR DISEASE CONTROL AND PREVENTION, FINAL REPORT ON FORMALDEHYDE LEVELS IN FEMA-SUPPLIED TRAVEL TRAILERS, PARK MODELS, AND MOBILE HOMES (2008).

93. LIU ET AL., *supra* note 5, at app. 25, tbl. 22.

94. Press Release, Fed. Emergency Mgmt. Agency, FEMA Temporary Housing Program Ending for Families fo Hurricanes Katrina and Rita (Apr. 7, 2009), *available at* http://www.fema.gov/news/newsrelease.fema?id=47936.

95. *See Katrina Survivors Deserve Better Than Mattresses Under I-10*, USA TODAY, June 17, 2008, at 8A [hereinafter *Katrina Survivors Deserve Better*].

96. *See* Anne Rochell Konigsmark, *Crime Takes Hold of New Orleans: Murder Rate Soars as Violence Creeps into Upscale Neighborhoods*, USA TODAY, Dec. 1, 2006, at 1A.

97. *See infra* Part II.A.

income housing is built, what will become of the thousands who, pre-Katrina, had been long-term residents in the federally subsidized housing projects which have now been demolished and (2) whether public schools will be rebuilt and staffed. While a full treatment of these issues is beyond the scope of this Article, it is important to note that their resolution will largely determine whether and under what circumstances households—particularly families with children—will be able to return to New Orleans, and live safe and healthy lives.

II. KATRINA'S CHALLENGES TO FAMILY LAW: THE LEGAL ISSUES

Given the extreme and widespread dangerous conditions, and the catastrophic trauma and experiences described above, it will take concentrated efforts from the health, educational, social services, child welfare agencies, as well as the legal system to begin to remedy these effects. To recover, children—and their parents—will need special and prioritized attention from state, local, and federal agencies, to get back in school, fed, clothed, and into quality housing, while also ensuring that all of the related educational, physical, and mental health aspects remain intact.

This is the case whether families return to New Orleans, or resettle from within the Katrina Diaspora. Children—and parents—who are survivors of Katrina will require specialized, highly skilled, and committed service providers and educators. Generally, these needs—nearly four years after the Storm—are not being met for many families with minor children. Legal advocacy, and the family and juvenile law justice systems must play a strong and central role in advocating for the special needs of Katrina family survivors, protecting these children's rights, and ensuring that they are no longer left behind.

However, family law is tailored traditionally to the nuclear, middle-class family, and applied usually to a single-change situation—such as a parental divorce or a parental relocation. When disaster hits, and the effects of multiple, highly damaging trauma are experienced, traditional family laws are more fractured and less effective. This has been the case since Katrina and the flooding of New Orleans dealt unprecedented disruption and displacement on an already highly vulnerable population—poor women, children, and their family units.[98] As a result, the Storm has stretched existing family structures, traditional family law, domestic policy, the public health establishment, the family courts, and the foster care and child welfare systems to new boundaries.

Family law in New Orleans, particularly the laws of custody, guardianship, adoption, foster care, and child welfare, as well as the laws of divorce and domestic violence, is necessarily undergoing change brought on by the Storm and its ongoing aftermath. New areas of law and legal practice have emerged to meet the challenges of families in the post-Katrina reality. As a result, public law and policy affecting families and children, and their access to the courts, to health care, public education, and other public services, deserve serious attention. The following areas of family law and family-related law reflect the myriad of ways that the Storm, its aftermath, and the ongoing "recovery" process has affected

98. *See supra* Part I.B.1.

women, children, extended kinship relations, and family units.

A. Family Unity, the Home, and Homelessness

The future of New Orleans's families—and the law's impact on determining the outcome—is based on normative and long-standing principles of family law and policy. First, the family is a basic unit of society and second, the adult family head or heads have certain rights to self-identify, to define the borders of their family's inclusiveness, and essentially to decide who is a family member and who is not.[99] Finally, a home is the orbit around which a family moves and the site or shelter within which a family organizes itself. A home is the organizational basis and the structure for the family unit.

Most, but not all, families live together at one time or another and together a family occupies a home. This is the case whether the family rents the home or owns it, has lived in it for many years or lives in the home temporarily, or returns to it periodically. Hurricane Katrina and the flooding of the city transformed this baseline reality for hundreds of thousands of families. First, by destroying or seriously damaging over 80% of the homes in New Orleans,[100] Katrina and the floods devastated and immediately disrupted the core of family life in the city. The destruction threw family life routines into chaos, left the children without schooling (and schools were also largely destroyed),[101] and in many ways shattered the safety and health (physical and mental) of family members. Second, almost all residents had to leave their homes for some period of time immediately before and after the hurricane and floods whether or not their homes were damaged. While many returned within several months after the Storm and the flood waters receded, many more have taken a year or more to return. Additionally, thousands of homes still lay abandoned and in ruins throughout the city, with their former residents living elsewhere—in many cases outside of the city and the Gulf Coast area.[102]

Under the dire, dangerous circumstances, families left homes unoccupied for weeks, months, or in many cases years. Electricity, sewage, water and other public utilities were damaged and cut off for weeks or months; in some

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99. *See* Moore v. City of East Cleveland, 431 U.S. 494, 503-06 (1973) (permitting the family members to define their family and rejecting strict adherence to a nuclear definition); *see also* Sally F. Goldfarb, *Disasters, Families, and the Law*, 28 WOMEN'S RTS. L. REP. 35, 41 (2007) (discussing the "functional method" of defining a family).

100. *See* Popkin et al., *supra* note 42, at 17 (noting that 39% of "owner-occupied" and 56% of "rental units" were flooded).

101. *See* Paul Hill & Jane Hannaway, *The Future of Public Education in New Orleans*, *in* AFTER KATRINA: REBUILDING OPPORTUNITY AND EQUITY INTO THE *NEW* NEW ORLEANS 27, 27 (Margery Austin Turner & Sheila R. Zedlewski eds., 2006) ("Katrina destroyed most of New Orleans's public education system.").

102. LIU ET AL., *supra* note 5, at 22; *see also* GREATER NEW ORLEANS CMTY. DATA CTR., NATIONAL BENCHMARKS FOR BLIGHT: HOW DOES NEW ORLEANS COMPARE TO OTHER CITIES IN TERMS OF UNOCCUPIED RESIDENTIAL ADDRESSES? (Mar. 31, 2008), *available at* http://gnocdc.s3.amazonaws.com/reports/BlightBenchmarks.pdf.

neighborhoods these services remain off today, almost four years after the Storm. Neighborhood blight has been rampant throughout the city, even as the fourth anniversary of Katrina approaches. As neighborhoods are unevenly rebuilt with little to no city-wide planning, direction, or funding, families who have rebuilt and returned home may sit within view of their neighbors' still unoccupied and ruined homes. The neighboring ruins, rodent infestation, garbage, and wreckage[103] present serious mental and physical health dangers to the neighborhood for both children and adults alike. Many city streets and sidewalks await City repair—dilapidated and rotted from the floods and Storm[104]—thus presenting further obstacles and hazards to returning residents.

It is not surprising, therefore, that after the Storm the first family-related legal matters that came before the local courts in large numbers were not per se family law issues, but rather were housing issues, specifically cases involving evictions, successions, and homelessness.[105] A full review and analysis of the housing issues precipitated by Hurricanes Katrina and Rita is beyond the scope of this Article; however, these issues deeply impacted, and continue to affect, most families in New Orleans.

The Storm and its aftermath raised different housing-related legal issues and challenges for affected families, depending on whether a family owned their home or were renting, pre-Katrina. For many homeowners, particularly poor, African-American homeowners, the issue of succession, or gaining clear legal title, was the first challenge. It is estimated that some 8000 families whose homes were destroyed did not have a clear title at the time Katrina hit the area.[106] Many homes had been passed informally through the generations without the benefit of the legal process of title passing.[107] As family members passed away, the next generation lived in the house without changing the recorded owner.[108] Ownership of the property was still officially listed as, perhaps, the original purchaser two, three, even four generations ago. In other cases, records were destroyed or lost—many in the floods themselves.

Over the years, family members had paid taxes and even taken out and paid for insurance policies on these houses. Yet, after the Storm, FEMA would not accept claims for subsidies and assistance without proof of titled ownership.[109] Moreover, homeowners could not successfully file insurance claims without clear

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103. For a detailed report on the post-Katrina blight and its impact, see GREATER NEW ORLEANS CMTY. DATA CTR., *supra* note 102.

104. *See* LIU ET AL., *supra* note 5, at 6 (noting that "[h]undreds of streets are still in disrepair").

105. Judge Landrieu Interview, *supra* note 13; Interview with the Honorable Sonia Spears, Judge, in New Orleans, La. (May 19, 2008) [hereinafter Judge Spears Interview].

106. Judge Landrieu Interview, *supra* note 13.

107. Zedlewski, *supra* note 5, at 7; *see also* Kenneth A. Weiss, *Clearing Title in Katrina's Wake*, PROB. & PROP., Sept.-Oct. 2006, at 42, 42 (discussing the general process of succession which was prevalent in New Orleans pre Katrina).

108. *See* Weiss, *supra* note 107, at 42 (noting that many home "'owners' [of record] have been dead for years").

109. *See id.* (noting that for FEMA to accept claims title had to first be cleared).

title.[110] Later, when the State of Louisiana started the Road Home Program,[111] pursuant to the powers delegated to States under the Federal Stafford Act,[112] in order to receive a Road Home grant, homeowners needed to show clear title.[113] Through the process of "succession," the method of passing title after death which is characteristic of the civil law system of Louisiana,[114] homeowners could legally establish clear title. For families that could afford attorneys, they enlisted their family law attorneys to represent them in this process. Indeed, these succession and clear title actions were frequently the first type of legal matter that many family law attorneys engaged in post-Katrina.[115] For the thousands who could not—and still cannot—afford attorneys, legal services attorneys have been representing such parties in navigating this legally cumbersome process of succession in hopes of resolving at least partial title to their homes.[116] The filing of succession cases has been an ongoing process since the Storm.[117]

Families who rented their homes—apartments, houses, and buildings in the housing projects—before the Storm faced equally, if not more, daunting legal challenges to secure their former housing or its equivalent after the Storm. Most renters had to evacuate their flooded and damaged rentals during the hurricane and floods, leaving most of their possessions, furniture, and personal items in place.[118] The rental side of the housing spectrum, for families returning or trying to return to the city, has manifested itself in a massive number of eviction proceedings.[119] The numbers are indeed staggering and confounding at once,

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110. *Id.*

111. Governor Kathleen Blanco announced the start of the Road Home Program on August 22, 2006. Press Release, The Road Home, The Road Home Opens Ten Housing Assistance Centers Statewide (Aug. 22, 2006), *available at* http://road2la.org/news_releases/HACs-082206.htm.

112. Robert T. Stafford Disaster Relief and Emergency Assistance Act § 322, 42 U.S.C. § 5165(c)-(e) (2006).

113. THE ROAD HOME, LA. RECOVERY AUTH., THE ROAD HOME HOMEOWNER PROGRAM POLICIES: VERSION 6.2, at 14 (2009), *available at* http://road2la.org/Docs/policies/Homeowner_Program_Policies_v6.2_4.13.09.pdf (noting that applications are accepted despite clouds on titles but "[p]rior to closing title issues must be cleared up").

114. Judge Landrieu Interview, *supra* note 13.

115. *Id.*

116. For an overview of the New Orleans Legal Assistance Corporation, see generally Southeast Louisiana Legal Services, About SLLS, http://www.nolac.org/AboutUs.cfm?pagename=AboutUs (last visited May 31, 2009). For more information on The Pro Bono Project, see generally The Pro Bono Project, http://www.probono-no.org (last visited May 31, 2009).

117. Judge Landrieu Interview, *supra* note 13.

118. *See* Sue Kirchoff, *Rebuilding After Katrina to Take Monumental Effort*, USA TODAY, Oct. 6, 2005, at 1B (noting that according to the "National Low Income Housing Coalition . . . more than half the housing destroyed by Katrina was rentals").

119. For a discussion of the reality of the post-Katrina evictions, see William P. Quigley, *Obstacle to Opportunity: Housing that Working and Poor People Can Afford in New Orleans Since Katrina*, 42 WAKE FOREST L. REV. 393, 399-403 (2007) [hereinafter Quigley, *Obstacle to Opportunity*] (discussing the pre- and post-Katrina rental eviction picture); William P. Quigley,

raising the question why an eviction would be a fair or necessary legal action if the housing had been severely damaged or destroyed in the catastrophe. Yet, in the months following Katrina, landlords, backed by state and parish eviction laws historically harsh to tenants,[120] and eager to raise rents or raze their properties for profitable redevelopment, sought eviction actions in order to free their property of prior, now displaced, tenants.[121]

Immediately following Katrina, the Orleans Parish Civil Court heard upwards of one hundred eviction cases a day, most with no tenants present.[122] Even three years after the Storm, the court still heard twenty to thirty eviction cases a day, releasing the properties of former tenants, many of whom were never even given an opportunity to return for their possessions.[123] At the same time, former tenants of the now demolished housing projects never had a chance to regain the possessions they had left behind, nor the due process rights of an eviction hearing.[124]

Increasingly, families are finding themselves homeless as they return to New Orleans. Both former homeowners and tenants alike face the grim prospect of homelessness in New Orleans should they decide to return to the city. Many families have returned to find their formerly rented homes in ruins, re-developed as higher rent housing, or demolished—as in the case of the housing projects razed by the city and federal housing authorities.[125] Increasingly, individuals and families have been forced to crowd in with friends and relatives, squat in the ruins of houses and apartments, live in shelters and trailers,[126] and, at one point, may have had no recourse but to live in the Tent City under the I-10 underpass at Claiborne and Canal Streets.[127] Some have returned to New Orleans only to leave again when faced with homelessness and all the collateral social, health, and safety issues that accompany such a situation.

Homelessness, perhaps more than any other factor, defines the reality of the

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Thirteen Ways of Looking at Katrina: Human and Civil Rights Left Behind Again, 81 TUL. L. REV. 955, 992-95 (2007) [hereinafter Quigley, *Thirteen Ways*] (discussing the post-Katrina eviction reality). In addition, Judge Spears also noted the dramatic increase in eviction actions she has seen in the courts, post-Katrina. Judge Spears Interview, *supra* note 105.

120. *See* Quigley, *Obstacle to Opportunity*, *supra* note 119, at 401; Quigley, *Thirteen Ways*, *supra* note 119, at 993 (both noting that Louisiana eviction law permitted notice of eviction by "tacking" notice to the door of the rental property).

121. Judge Spears Interview, *supra* note 105.

122. *Id.*

123. *Id.*

124. *Id.*

125. For discussion of the loss of housing post-Katrina, see generally Davida Finger, *Stranded and Squandered: Lost on the Road Home*, 7 SEATTLE J. FOR SOC. JUST. 59 (2008) (discussing the fact that the devastation from Katrina persists in the failure to provide housing for those returning); Quigley, *Obstacle to Opportunity*, *supra* note 119, at 393-418 (discussing the lingering problems in the housing market as it existed in 2007).

126. *See* Konigsmark, *supra* note 96.

127. *See Katrina Survivors Deserve Better*, *supra* note 95.

ongoing disaster and the enormous, perhaps incalculable, impact the Storm has had on peoples' lives. Thousands of former residents, including many families with children have found themselves homeless in the post-Katrina New Orleans reality. Homelessness is dramatically diminishing the possibility for many families to make a permanent return to a safe and family-appropriate setting back home in New Orleans.

B. "Katrina Divorces"—The Challenge of Increased Marital Dissolutions Within the Framework of Disaster Family Law

The stress of dealing with the Storm, its aftermath, and the protracted recovery has overwhelmed many current and former residents. At least one report has noted that while the city's population nearly four years after the Storm is approximately two-thirds of its size before the Storm, divorces have increased nearly 35% from pre-Storm divorce rates.[128] Stress and other factors have contributed to this significant increase in divorce filings in Orleans Parish. It is important to note that this does not account for divorces that are filed outside of New Orleans in places where the dislocated and displaced residents have settled.

The Storm's emotional aftermath—the stress it inflicted on people and their relationships—pushed many couples to the breaking point. Stress research indicates that divorces are likely to increase following a disaster.[129] The problems present in New Orleans post-disaster are connected and synergistic; they magnify and amplify each other.[130] Individuals struggle with the hostile landscape of everyday life in New Orleans during the attempted recovery. Personal struggles impact the entire family and as family stress increases it impacts the individual. For example, increased financial strain caused by a negative response, or lack of response, from a FEMA agent fuels already existing anger and frustration. The anger and financial frustration is redirected at one's spouse causing arguments and strain on the relationship. Instead of being a source of support, the family becomes another source of conflict and stress. Systemic frustration, combined with the incredibly slow and bureaucratic recovery from the disaster, stress on family systems, and stress on the individual

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128. Maria Barrios, *Matrimoney: Pre- and Postnuptial Agreements Gain in Popularity*, NEW ORLEANS CITY BUS., *available at* http://www.neworleanscitybusiness.com/viewFeature.cfm?recID=924(noting that "New Orleans population is down 35[%] from 460,000 before Hurricane Katrina to about 300,000 now. Likewise, divorces increased about 35[%] between 2003 and 2006, according to the Orleans Parish Clerk of Court").

129. *See* Catherine L. Cohan & Steve W. Cole, *Life Course Transitions and Natural Disaster: Marriage, Birth, and Divorce Following Hurricane Hugo*, 16 J. FAM. PSYCHOL. 14, 19-20 (2002).

130. *See, e.g.*, J. Steven Picou & Brent K. Marshall, *Introduction: Katrina as a Paradigm Shift: Reflections on Disaster Research in the Twenty-First Century*, *in* THE SOCIOLOGY OF KATRINA: PERSPECTIVES ON A MODERN CATASTROPHE 1, 13 (David L. Brunsma et al. eds., 2007) ("For example, experiencing a death in the family, displacement, the destruction of your home, the breakdown of family relationships, and losing neighborhood and familial social networks are associated with cycles of anger, domestic violence, loss of trust, metal health problems, and spirals of resource loss that result in new threats, warnings, and impacts through the postdisaster period.").

all cycle back on one another causing extraordinary levels of dissatisfaction with life in the city.

A door-to-door survey conducted in New Orleans from September 12 to November 13, 2006 found 22% of respondents "said that the Storm and its aftermath had caused some level of stress in their 'marriage or other serious relationship.'"[131] Five percent of respondents in Orleans Parish said that their marriage or relationship ended as a result of the stress following the storm.[132] Life in the Big Easy has been anything but easy in the four years since the Storm. Families are still dislocated; some spouses are separated by long distances. Some families still crowd into small FEMA trailers triggering extreme pressure between spouses and exacerbating already existing stressors and problems.[133] The average FEMA trailer is only 256 square feet and has one bedroom and one bathroom.[134] Some trailers are even smaller[135] leading to potential physical and mental health problems and, in some cases, violence and suicide.

Many families are still trying to juggle work, school, family, and community obligations[136] while rebuilding[137] and refurnishing their homes. Added to that has been the stress of diminished resources—many New Orleanians lost their jobs after Katrina[138] and the cost of living in New Orleans is significantly higher than

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131. KAISER FAMILY FOUND., GIVING VOICE TO THE PEOPLE OF NEW ORLEANS: THE KAISER POST-KATRINA BASELINE SURVEY 13 (2007), *available at* http://www.kff.org/kaiserpolls/upload/7631.pdf. This survey was conducted in New Orleans. *Id.* at 5. "Those in Orleans Parish reported more marital problems—with nearly one in four (22 percent) saying this has been a problem since the storm." *Id.* The survey did not measure the impact of the Storm on displaced residents living *outside* of New Orleans at the time the survey was conducted. These numbers could be significantly higher if all current and former residents who were impacted by Katrina were surveyed.

132. *Id.* at 13.

133. *See supra* notes 90-93 and accompanying text.

134. FED. EMERGENCY MGMT. AGENCY, DEP'T OF HOMELAND SEC., ALTERNATIVE HOUSING PILOT PROGRAM: GUIDANCE AND APPLICATION KIT 7 (2006), *available at* http://www.fema.gov/pdf/government/grant/ahpp_guidance.pdf.

135. Assoc. Press, *Tight Squeeze: Life Inside FEMA Trailer*, CBS NEWS, Mar. 25, 2006, *available at* http://www.cbsnews.com/stories/2006/03/25/ap/national/mainD8GISR882.shtml (discussing the story of Gus McKay, his wife, and two teenage daughters who lived in a FEMA trailer for more than a year after the Storm; their trailer was 180 square feet).

136. Interview with the Honorable Paulette Irons, Judge, New Orleans Civil District Court, in New Orleans, La. (May 20, 2008) [hereinafter Judge Irons Interview]. Judge Irons reported that she sees parties in her court room that are experiencing the same issues as prior to the Storm but the problems are now exaggerated due to the difficulty of navigating the post-Katrina landscape of everyday life and this is leading to increased mental health issues. *Id.*

137. The number of contract disputes between contractors and homeowners has risen dramatically in the past two and one-half years adding to the stress of families who are rebuilding. Deon Roberts, *State Officials Fear Surge in Contractor Fraud Cases*, NEW ORLEANS CITYBUSINESS, *available at* http://www.neworleanscitybusiness.com/ViewFeature.cfm?recid=716 (last visited July 7, 2009).

138. *See* GULF RECONSTRUCTION WATCH, INST. FOR S. STUDIES, BLUEPRINT FOR GULF

before the Storm.[139] Many families likely continue to pay the mortgage on their damaged or destroyed property in New Orleans and at the same time pay rent for temporary housing elsewhere. A number of families are still awaiting their Road Home[140] grant. Furthermore, personal frustrations and overcrowded conditions have been exacerbated by the city's broken infrastructure. Many families cannot even get health and mental health care because there are fewer doctors and health care facilities in New Orleans.[141] The public transportation system operates fewer routes since the storm[142] and some public schools do not own buses[143] making just getting to school and work frustrating. The frustrations add up and sometimes tear families apart.[144]

Other factors also likely contribute to the increase in divorce filings. In New Orleans it is not uncommon for spouses who desire divorce to live as if divorced but without actually obtaining a legal division. In some cases, spouses have probably not seen each other in years. Louisiana, though, is a community property state—assets owned by one spouse are, in most cases, treated under the law as property owned by both spouses.[145] Because of this, tremendous amounts of community property are jointly owned by people who no longer have a social connection to each other. When a disaster occurs, finding a long lost spouse, a

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RENEWAL: THE KATRINA CRISIS AND A COMMUNITY AGENDA FOR ACTION 4 ("There are 100,000 fewer jobs available in New Orleans today than before the 2005 storms."); *see also* Harry J. Holzer & Robert I. Lerman, *Employment Issues and Challenges in Post-Katrina New Orleans*, *in* AFTER KATRINA: REBUILDING OPPORTUNITY AND EQUITY INTO THE *NEW* NEW ORLEANS 9, 10 (Margery Austin Turner & Sheila R. Zedlewski eds., 2006) ("Average displaced workers lose 15 to 20% of prior earnings once reemployed—commonly more if they are older or less educated.").

139. *See* LIU ET AL., *supra* note 5, at 12 (noting that in January 2009 rents were 52% higher in New Orleans than they were prior to the Storm).

140. Road Home is grant funding provided through HUD's Community Development Block Grant (CDBG) Program and administered by the State that offers "up to $150,000 to certain eligible homeowners whose primary residences were destroyed or severely damaged following Hurricanes Katrina and Rita." Press Release, U.S. Dep't of Housing and Urban Dev., Jackson Approves Louisiana's $4.6 Billion "Road Home Program": Calls for Quick Congressional Approval of Additional $4.2 Billion for Louisiana (May 30, 2006), *available at* http://www.hud.gov/news/release.cfm?content=pr06-058.cfm.

141. LIU ET AL., *supra* note 5, app. at 56, tbl. 42 (showing that in December 2008 only 57% of the state-licensed hospitals that were open in July 2005 were open).

142. *Id.* app. at 54-55, tbl. 41 (noting that the New Orleans Regional Transit Authority operated 50% fewer routes in November 2008 than it operated in July 2005).

143. NEW ORLEANS PARENTS' GUIDE TO PUBLIC SCHOOLS (3d ed. 2009), *available at* http://www.nolaparentsguide.org/Parents'%20Guide%20March09.pdf. Of the ninety-six public schools that state a method of transportation, seven provide RTA tokens and six provide no transportation. *Id.*

144. For an excellent description of attempting to perform typical daily functions while also rebuilding the legal community, see generally Michael J. Vitt, *After the Storm: Gulf Coast Lawyers Rebuild*, 63 BENCH & B. MINN. 22 (Mar. 2006).

145. LA. CIV. CODE ANN. art. 2340 (2009) (noting a presumption of community property).

lawyer (or two), and navigating the divorce process is one more significant source of stress.

In most cases, divorcing couples with minor children must live separate and apart for 365 days prior to obtaining a divorce judgment and couples without children must wait 180 days.[146] During the 180- or 365-day waiting period, spouses create informal arrangements regarding property and children. If those arrangements are working when the waiting period ends, the spouses often do not see the need to expend resources to finalize the legal process. Due to Hurricane Katrina, those informal arrangements stopped working and triggered the need for parties to formally file for a divorce.

Katrina became a catalyst for divorce in large part because disaster and recovery laws and programs typically treat the nuclear family and the marital unit as the legal recipient of disaster benefits and other relief.[147] For example, after the Storm, even though in some cases spouses had not lived together for years, homeowner's insurance, flood insurance, and Road Home checks were made payable to both spouses as a marital unit because property was owned jointly.[148] Suddenly, the spouse who remained living in the marital home was faced with serious, if not totally daunting, obstacles in order to collect disaster benefits and payments. First, they had to locate the other spouse and, then, they had to gain that other spouse's cooperation in negotiating the checks.

Due to the widespread dislocation of New Orleans's residents after the Storm, finding any person was a major challenge. Finding someone with whom there has been no contact for several years was even more difficult. Next, gaining cooperation to use the checks solely for repair of property from someone with whom there may previously have been an acrimonious relationship could be impossible. As a result, some spouses use the divorce process as a method of settling property issues and forcing the other spouse's cooperation to use the insurance and/or Road Home funds to repair the property. For many people, post-Katrina disaster and insurance benefits were likely a family's greatest, or only remaining, asset, particularly if the marital home had been damaged or destroyed.

Under Louisiana State divorce law, one method of using the divorce process to "gain" the other spouse's cooperation is to petition for divorce, include the disaster relief and insurance check(s) as community property, and then request that the court divide the check(s) appropriately.[149] However this could lead to both spouses obtaining only a portion of the disaster relief, leaving insufficient

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146. LA. CIV. CODE ANN. art. 103.1 (Supp. 2009).

147. *See* Goldfarb, *supra* note 99, at 41-42 (noting the problems seen through the 9/11 Victims Fund in terms of how benefits are paid to family members).

148. *See, e.g.*, The Road Home, Frequent Questions, http://www.road2la.org/homeowner/faqs.htm (noting that when property is owned by husband and wife as community property that both spouses must sign the covenants and "will jointly receive benefits unless legal documents direct [otherwise]").

149. *See* LA. CIV. CODE ANN. art. 2374 (2009) (providing for the separation of community property upon the petition for dissolution of marriage).

funds to repair the property.[150] The remaining sole owner of the damaged property then must either try to find financing to repair the property or sell the flooded house and hope to receive enough funds to cover the remaining mortgage by supplementing it with insurance proceeds.

A second method of utilizing the divorce process to "gain" the other spouse's cooperation in obtaining and using disaster relief and insurance funds to repair the property is to file for divorce and partition property *prior* to filing an insurance or Road Home claim. This method has circumvented joint payee checks altogether. The property would be divided, usually by one party buying-out the other party. Then the spouse with sole ownership would file the insurance and/or Road Home claim and, once compensated, could use all of the funds to repair the property. Only parties with sufficient assets to buy out the other party have had this option. Also, only parties who had sufficient time prior to filing insurance or Road Home claims had this option. However, this approach often is not possible for low-income families due to a lack of resources to buy the other spouse out of his/her share of the property.

In the aftermath of Hurricane Katrina, the need to have a legally recognized division of community property caused a surge in court filings.[151] This post-disaster legal phenomenon clogged the courts, consumed valuable attorney time, and added one more significant challenge to the already daunting list of things returning and displaced New Orleanians had to do.

Furthermore, the number of spouses living apart at the time of the disaster would most likely have not been so high if divorcing couples with minor children had not been required under Louisiana divorce law to live separate and apart for 365 days[152] prior to obtaining the divorce. The long length of time that spouses are required to live apart prior to obtaining a divorce encourages spouses to create informal mechanisms for dealing with what would have otherwise been handled through the legal process. This also encourages chaos when those informal mechanisms no longer work. This time, chaos in divorce court happened to coincide with chaos in the rest of the city.

C. Post-Katrina Domestic Violence as a Family Law Issue

Since the disaster, there has been a widely reported upsurge of criminal activity in New Orleans[153] due to a variety of factors. One of the most visible

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150. *See* The Road Home, Home Page, http://www.road2la.org/homeowner/default.htm (last visited Aug. 20, 2009). Homeowners who receive a compensation grant are not required to use the money to repair the property. At the time the grant recipient receives his/her money, he/she must sign a covenant stating that the property will be repaired within three years. If the homeowner chooses to use different money or the homeowner does not use all of the money, the homeowner is not required to return the money. *Id.*

151. *See* Weiss, *supra* note 107, at 43 (noting Louisiana community property law as one reason for an increase in title issues and court filings to clear title post-Katrina).

152. *See* LA. CIV. CODE ANN. art. 103.1(1) (Supp. 2009).

153. *See* Jeff Adelson, *Burglaries, Thefts Rise in 2008 but Other Crimes in Tammany Fell,*

developments has been a marked increase in domestic violence cases, largely attributed to the stress of living in post-Katrina New Orleans.[154] A full treatment of domestic violence, with all of its complex social factors, including mental health issues, is beyond the scope of this Article. However, it is important to recognize the specific impact that Storm stress and a frustrating, agonizingly slow, and uneven recovery process have had on family and spousal relations.

The increase in domestic violence—triggered in part by economic distress, frustration, stress, indignity, and abandonment by the government—is a marked characteristic of family relations in post-Katrina New Orleans.[155] Domestic violence has been fueled by living in the cramped and dire living conditions in tiny FEMA trailers and made more allowable in both the post-Storm disarray of life and the city's civil justice infrastructure.[156] In short, the stress of living in post-Katrina New Orleans has increased the occurrences of domestic violence.[157]

The normal stressors that contribute to domestic violence have been exponentially exacerbated by the social disarray, chaos, and trauma generated by the Storm. The economic and general disempowerment and frustration that often induces domestic violence has been particularly present in post-Katrina New Orleans.[158] Furthermore, studies have shown that women may be at increased risk of domestic violence after a catastrophe or disaster such as Katrina.[159] In disasters, and their aftermaths, families may suffer from isolation, stress, loss, and disruption of support mechanisms and begin to take such stresses out on one another.[160] Moreover, the lack of housing and shelters and an unwillingness to deal with government bureaucrats and agencies can leave a battered woman no choice but to stay with her batterer.[161]

Further, FEMA regulations governing their government-issued trailers and

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TIMES-PICAYUNE (New Orleans), Jan. 30, 2009, at 1, *available at* 2009 WLNR 1778835; Konigsmark, *supra* note 96.

154. Konigsmark, *supra* note 96.

155. *See* Robert R.M. Verchick, *Katrina, Feminism, and Environmental Justice*, 13 CARDOZO J.L. & GENDER 791, 798 (2007) (noting "soaring reports of domestic violence").

156. *See id.*

157. Konigsmark, *supra* note 96 ("And while [Orleans Parish Police Superintendent] Riley reports that 70% of murders are drug-related, there's an upswing in a new kind of crime: brutal, domestic violence that he attributes to the stress of living in post-Katrina New Orleans.").

158. Alison Fensterstock, *Network Difficulties*, GAMBIT WK. (New Orleans), Mar. 21, 2006, n.p., *available at* http://bestofneworleans.com/gyrobase/PrintFriendly?oid=oid%3A35852 (reporting that "[o]nly 4 percent of battered women ever seek refuge in a shelter, and after many have already dealt with multiple shelters and bureaucracies, the last thing they want is to encounter another one. Going through a tiresome legal process to hold their batterers accountable, or even blocking out the time . . . in the face of so many other exhausting imperatives—the insurance adjuster, getting FEMA on the phone, getting the kids in schools—is only a must-do if the victim makes it one").

159. *See* Goldfarb, *supra* note 99, at 37.

160. *Id.*

161. *Id.*

the claimant process for financial assistance and benefits have added to the stressors.[162] Women have been forced to negotiate with their batterer over who gets the FEMA check or the trailer because only one member of a household can make the claim or get assigned the trailer.[163] For example, FEMA regulations allow the issuance of only one trailer per household and, similarly, only one application per household for FEMA assistance.[164] This limitation reduces the possibility that a battered woman who wants to leave her abusive spouse that has already received FEMA assistance will get her own FEMA housing, forcing her to stay with her abuser. Clearly, reform of FEMA's regulations is essential in order to protect a battered spouse in the face of future disasters.

D. Children of the Storm—Child Custody Law in the Face of Disaster

As discussed previously,[165] the impact of Katrina on the young children of New Orleans, the great majority of whom were already living in poverty and highly at-risk, will be felt for years to come.[166] Children lost their physical possessions, connection to their culture, friends, and support systems, all in an instant.[167] When forced to evacuate to locations all over the country, children were separated from and deprived of the care that they received from primary caregivers prior to the Storm.[168] Some children remained separated from their primary caregiver for more than a year after the Storm and from non-primary parents many years after the Storm. A case in point is that of a three-year-old boy whose parents had separated a few months before the Storm.[169] While separated in New Orleans, both parents provided equal care for the child. When the Storm approached, the mother and child evacuated to Georgia and the father

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162. *Id.* at 37-39 (discussing the inadequacy of FEMA regulations to support battered women and the fact that such regulations actually increased family stressers). The FEMA regulations that are most applicable are contained in 44 C.F.R. § 206 (2008).

163. For the applicable FEMA regulation, see FEMA Federal Disaster Assistance, 44 C.F.R. § 206.117 (2008); *see also* Memorandum in Opposition to Plaintiffs' Request for Preliminary Injunctive Relief at 4-5, Ass'n of Cmty. Orgs. for Reform Now v. FEMA, 463 F. Supp. 2d 26 (D.D.C. 2006) (No. 06-CV-1521-RJL), *available at* http://citizen.org/documents/FEMAopp.pdf.

164. Goldfarb, *supra* note 99, at 38. For the FEMA regulation, see FEMA Federal Disaster Assistance, 44 C.F.R. § 206.117 (2008); *see also* FED. EMERGENCY MGMT. AGENCY, *supra* note 134, at 19.

165. *See supra* Part I.B.2.

166. *See* Golden, *supra* note 8, at 39 (noting that "Katrina deprived young children all at once of their homes, their familiar neighborhoods, and at least some of their close caregivers").

167. *See id.*

168. Forty-seven percent of people polled said that at some point they were separated from family members they were living with at the time of the Storm. Jeffrey M. Jones & Joseph Carroll, *Katrina Survivors Still Face Difficulties One Year Later: Conditions Are Improving in Some Areas*, GALLUP NEWS SERV., Aug. 29, 2006; *available at* www.gallup.com/poll/24286/Katrina-Survivors-Still-Face-Difficulties-One-Year-Later.aspx. One year after the Storm, ten percent of respondents were still separated from family members they lived with at the time of the Storm. *Id.*

169. This scenario is based on a case brought to The Pro Bono Project in New Orleans.

went to Los Angeles. Neither parent moved back to New Orleans; each settled in the city to which s/he had evacuated. The little boy now lives with his mother in Georgia, rarely sees his father, and the mother is a single parent. Parents and courts are struggling to make custody and relocation decisions in these unprecedented circumstances.

In Louisiana, child custody can be allocated within the divorce process;[170] however, it is frequently handled as a stand alone matter for three reasons. First, as mentioned, in most cases, divorcing couples with minor children must live separate and apart for 365 days prior to obtaining a divorce judgment.[171] During the one-year waiting period, many parents create informal agreements regarding child custody. By the end of the waiting period, if the parties have a working agreement, they often do not see the need to expend resources on the legal divorce process, especially low-income families. Second, there is no statutory requirement that custody be allocated at the time a judgment of divorce is granted. Instead, in the petition the parties may request a determination of custody, visitation, and support or they may reserve the right to request these at a later date.[172] Third, most children in New Orleans are born to unmarried parents;[173] thus, no divorce proceeding is necessary. Post-Katrina, however, families requested court intervention to help them resolve disputes that occurred as a result of the Storm and its aftermath.

The evacuation occurred on a weekend, a time that many children likely spend with their non-custodial parents, and the Storm hit on Monday morning.[174] Thus, many children evacuated before or after the Storm with their non-custodial parent.[175] In the chaotic days following the storm, many lawyers, judges, and families attempted to determine where children were and where was the best place for each child to be.[176] Amid the chaos, flexibility among social service

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170. LA. CIV. CODE. ANN. art. 131 (1999) ("In a proceeding for divorce . . . the court [may] award custody of a child in accordance with the best interest of the child.").

171. LA. CIV. CODE ANN. arts. 103(1), 103.1(2) (Supp. 2009).

172. LA. CIV. CODE ANN. art. 105 (1999) ("In a proceeding for divorce *or thereafter*, either spouse may request a determination of custody, visitation, or support of a minor child; support for a spouse; injunctive relief; use and occupancy of the family home or use of community movables or immovables; or use of personal property.") (emphasis added); *see also id.* art. 131 ("In a proceeding for divorce *or thereafter*, the court shall award custody of a child in accordance with the best interest of the child.") (emphasis added).

173. *See* Zedlewski, *supra* note 17, at 3 (noting that 70% of all births in 2004 were to unmarried women).

174. *See* Michael J. Vitt, *After the Storm: Gulf Coast Lawyers Rebuild*, BENCH & B. MINN., Mar. 2006, at 22, 24 ("Many children were visiting noncustodial parents when the hurricane hit over a weekend.").

175. *See id.* (labeling such action as "custody by Katrina").

176. *See* Steven J. Lane, *Jurisdictional and Practical Problems in Family Law Following Hurricane Katrina*, 69 TEX. B.J. 438, 442 (2006) (quoting Anthony Hayes, who formed Operation Reunite, a non-profit organization dedicated to bringing separated families back together in the days following Hurricane Katrina, as declaring, "We faced an acute custody crisis").

agencies and child welfare agencies was essential. Parents also needed to be flexible to ensure the welfare of the child—whether the child's best interest was served by being with the custodial parent, non-custodial parent, or someone else. In addition, Judges needed to exercise flexibility in creating plans for children who were now all over the country displaced within the Katrina Diaspora.[177]

After the waters of Lake Pontchartrain flooded the city,[178] family law cases flooded the courts.[179] Some families requested initial custody determinations because the informal agreement under which they had been operating was no longer possible.[180] Some families presented the court with relocation issues.[181] As the days and weeks following the hurricane turned into months and years, determining which parent could best serve the child's best interest and where the child should live became more and more difficult. Two areas of law that have greatly impacted families during and after the Storm are modification of custody orders[182] and relocation issues.[183] In addition, courts in Louisiana and across the country have increasingly been faced with jurisdictional issues.

1. Family Dislocation Leads to Custody and Visitation Modifications.— After the Storm, life as New Orleanians knew it was gone. Residents were unable to be in their homes, employment and schools were uncertain or non-existent, and mental health was stretched to the limits. Elements that create stable environments for families and children were not only gone but were far out of the grasp of parents and caretakers and no one knew how long it would continue. Factors that had been used to make existing custody determinations no longer existed, generating increased numbers of modification cases whose facts have been uniquely Katrina-driven in nature. Orleans Parish family law judges have been faced with the challenges of applying traditional modification standards to these new types of Katrina custody and visitation modification cases.

Louisiana has two different standards for modification of child custody orders.[184] To prevent unjustified litigation and to promote stability in living conditions and the custodial arrangement, custody determinations made after a judge evaluates each parent's fitness (in Louisiana called "considered" custody determinations)[185] cannot be changed unless the parent seeking the change demonstrates that the present custody is so "deleterious to the child as to justify

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177. Judge Landrieu Interview, *supra* note 13.

178. For an account of the flooding, see McQuaid, *supra* note 1.

179. *See* Lane, *supra* note 176, at 439 (noting that while the full effect of the Storm on family law is "not yet fully known, the disputes between custodial and non-custodial parents are beginning to flood the courts").

180. Judge Irons Interview, *supra* note 136.

181. Judge Landrieu Interview, *supra* note 13.

182. Judge Irons Interview, *supra* note 136.

183. *Id.*; Judge Landrieu Interview, *supra* note 13.

184. *See* Evans v. Lungrin, 708 So. 2d 731, 738 (La. 1998) (discussing and describing the rules for a "considered decree" and a "stipulated judgment" custody order).

185. *See id.* (citing Hensgens v. Hensgens, 653 So. 2d 48, 52 (La. Ct. App. 1995)).

a modification of the custody decree, or of proving by clear and convincing evidence that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child."[186] However, to modify a stipulated custody order (one in which the parties consent to a custodial arrangement and no evidence of parental fitness is presented to the court), the law mandates a more flexible standard with a lowered burden of proof on the party seeking modification.[187] In these cases, the petitioner must "prove that there has been a material change of circumstances since the original custody decree was entered and that the proposed modification is in the best interest[188] of the child."[189]

For most people, the Storm caused a "material change in circumstances"—forced evacuation, dislocation, and sometimes joblessness and homelessness. And in some circumstances, it is clear that a continuation of the child living with the custodial parent is deleterious and that the advantages of a change of "environment" substantially outweighed the harm. However, in many situations the answer is not clear. Determining the nature of the change in circumstances, the deleteriousness of the new environment, and applying the best interest factors is complicated because the conditions that caused the change in circumstances were imposed, not freely chosen by the parent, and were imposed on a very wide scale. Judges first had to determine how long the change in circumstances would last.[190] Perhaps a family's evacuation would be short lived and they would

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186. Bergeron v. Bergeron, 492 So. 2d 1193, 1200 (La. 1986).

187. *See Evans*, 708 So. 2d at 738 (citing *Hensgens*, 653 So. 2d at 52).

188. The best interest of the child is determined by weighing several factors. LA. CIV. CODE ANN. art. 134 (1999). The Code states that the

> court shall consider all relevant factors in determining the best interest of the child. Such factors may include: (1) The love, affection, and other emotional ties between each party and the child. (2) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child. (3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs. (4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment. (5) The permanence, as a family unit, of the existing or proposed custodial home or homes. (6) The moral fitness of each party, insofar as it affects the welfare of the child. (7) The mental and physical health of each party. (8) The home, school, and community history of the child. (9) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference. (10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party. (11) The distance between the respective residences of the parties. (12) The responsibility for the care and rearing of the child previously exercised by each party.

Id.

189. *Evans*, 708 So. 2d at 738.

190. *See Bergerson*, 492 So. 2d at 1195 (a pre-Katrina case establishing that before considering the best interests of the child in a proposed modification of custody, the court must

be able to return to their old home or at least their old neighborhood. Examining the child's current environment and the environment to which the child would go if the change of custody was granted was even more difficult if neither parent was in New Orleans at the time the change of custody was requested. The answers to these questions are often impossible to know, but a prediction still has to be made.

Applying some of the best interest factors[191] is problematic also. Factors such as the length of time the child has lived in a stable and adequate environment,[192] the mental health of each party,[193] and the home, school, and community history of the child[194] all have very limited impact on the proposed change of custody. The length of time the child lived in a stable environment and the child's home, school, and community history is irrelevant if the child currently has no stable home, school, or community. The mental health of each party is important but only in the extremes.[195] With the level of stress caused by the hurricane, most New Orleanians' mental health was at its breaking point, thus neither parent's mental health is likely more stable than the other parent's. While examining the statutory best interest factors is important, courts and families need to recognize the limitations of the factors in the face of such unique circumstances.

Many children lost everything to Hurricane Katrina. In some circumstances a change of custody is warranted and necessary for the child. Unfortunately, some parents have exploited the Storm's disruption to unscrupulously seek custody modification. However, the conflict between parents that occurs during custody litigation is yet one more stress that children do not need.

2. The Katrina Diaspora and Child Custody Relocation Law.—Relocation cases increased proportionally more than any of the other types of family law or child custody cases that the courts saw in the aftermath of the Storm.[196] As discussed earlier, children were scattered all over the country during the evacuation.[197] Some were separated from their family members and at times were thought to be lost or, perhaps, actually were lost. In one case, a divorced mother evacuated with her five year-old daughter.[198] Her home in New Orleans

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consider the "materiality" of the change because the court does not want "to change the child's established mode of living except for *imperative* reasons") (emphasis added).

191. *See supra* note 188.

192. LA. CIV. CODE ANN. art. 134(4) (1999).

193. *Id.* art. 134(5).

194. *Id.* art. 134(7).

195. *Compare* Timmons v. Timmons, 605 So. 2d 1162 (La. Ct. App. 1992) (affirming lower court's award of domiciliary custody to mother despite her substance abuse, depression, personality disorder, and her previous treatment for such problems), *with* Bruscato v. Bruscato, 593 So. 2d 838 (La. Ct. App. 1992) (denying an award of custody when father was tested by a psychiatrist who testified to the father's inability to use "good judgment").

196. Judge Landrieu Interview, *supra* note 13.

197. *See supra* notes 174-77 and accompanying text.

198. Lynette Clemetson, *Torn by Storm, Families Tangle Anew on Custody*, N.Y. TIMES, Apr.

was destroyed by the Seventeenth Street canal breach.[199] She settled in Fort Worth, Texas, enrolled her daughter in school, and planned to stay until the end of the school semester.[200] However, her former husband filed an emergency petition for custody and return of the child to New Orleans.[201] The court informed the mother that she would lose custody of her daughter if she relocated outside of the New Orleans area.[202] The mother stated, "I had just lost every single thing I owned, and now a judge was telling me I could lose my child if I didn't come back . . . . It just seemed crazy and unfair."[203]

Louisiana law regulates a custodial (called a "domiciliary parent" in Louisiana[204]) parent's ability to relocate with the child.[205] The law places a heavy burden upon the relocating parent to demonstrate that the request for relocation is in good faith and that it is in the child's best interest.[206] "Good faith" requires

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16, 2006, § 1, at 1.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *See* LA. REV. STAT. ANN. § 9:335(B)(2) (2008) (noting that the "domiciliary parent is the parent with whom the child shall primarily reside").

205. *See* LA REV. STAT. ANN. §§ 9:355.1 to :355.17 (2008 & Supp. 2009).

206. LA REV. STAT. ANN. § 9:355.12 (2008). Factors the court shall consider in determining if the relocation is in the best interest of the child are:

> (1) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the nonrelocating parent, siblings, and other significant persons in the child's life.
>
> (2) The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.
>
> (3) The feasibility of preserving a good relationship between the nonrelocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.
>
> (4) The child's preference, taking into consideration the age and maturity of the child.
>
> (5) Whether there is an established pattern of conduct of the parent seeking the relocation, either to promote or thwart the relationship of the child and the nonrelocating party.
>
> (6) Whether the relocation of the child will enhance the general quality of life for both the custodial parent seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity.

that the parent seeking relocation is moving for a legitimate reason, such as employment,[207] and that the relocation request is not unwarranted or frivolous.[208] Traditionally, this burden has not been difficult to satisfy.[209] However, in *McLain v. McLain*[210] a Louisiana court found that Mrs. McLain did not meet the requirement of good faith when she did not return after evacuating for Hurricane Katrina.[211] Prior to the Storm, she and her husband had lived apart for a few years and had an informal custody and visitation agreement in which the parents had joint custody of both children and Mrs. McLain was the domiciliary parent.[212] Mrs. McLain evacuated with the children and did not return after the

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(7) The reasons of each parent for seeking or opposing the relocation.

(8) The current employment and economic circumstances of each parent and whether or not the proposed relocation is necessary to improve the circumstances of the parent seeking relocation of the child.

(9) The extent to which the objecting parent has fulfilled his or her financial obligations to the parent seeking relocation, including child support, spousal support, and community property obligations.

(10) The feasibility of relocation by the objecting parent.

(11) Any history of substance abuse or violence by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

(12) Any other factors affecting the best interest of the child.

LA. REV. STAT. ANN. § 9:355.12 (2008). To see how these factors are applied by courts, see, e.g., *McLain v. McLain*, 974 So. 2d 726, 736-41 (La. Ct. App. 2007).

207. *See, e.g.*, Pittman v. Pittman, 653 So. 2d 1211, 1212-13 (La. Ct. App. 1996).

208. LA. REV. STAT. ANN. § 9:355.16 (2008) (providing that the court may sanction a party for an unwarranted or frivolous request); *see also* LA. REV. STAT. ANN. § 9:355.13 (2008) (providing the relevant burden of proof for the relocating parent as two pronged: "The relocating parent has the burden of proof that the proposed relocation is made in good faith and is in the best interest of the child.").

209. *See, e.g.*, Blackburn v. Blackburn, 836 So. 2d 1222 (La. Ct. App. 2003) (permitting the relocation of the six-year-old son with his mother even though both mother and father were involved and active in the child's life primarily on the basis that mother fostered a relationship between the father and son and that the child would be moving with his half-sister with whom he had a good relationship). In *Blackburn*, the court also noted that the "trial court is vested with vast discretion in matters of child custody and visitation, and its determination is entitled to great weight and will not be disturbed absent a clear showing of abuse of discretion." *Id.* at 1223.

210. 974 So.2d 726 (La. Ct. App. 2007).

211. *Id.* at 735.

212. *Id.* at 727-28.

Storm because her home in New Orleans had become uninhabitable.[213] Mr. McLain returned to New Orleans shortly after the Storm.[214] Mrs. McLain found the city to which she had evacuated to be a good place to raise the children and decided to stay there.[215] However, she had no family, support system, or employment prospects *prior* to relocating; thus, the court determined that her move was not in good faith.[216] Perhaps, had she secured employment prior to evacuating, the court would have found that she met the good faith element.[217] But finding a city with functioning schools, affordable housing, and lower crime rates was not a sufficient reason to relocate the children. The court required the children to return to a devastated New Orleans.[218] Infrastructure that would encourage families to return (affordable housing, schools, city services) needs to be put in place. Until that occurs, systems and social service agencies need to support families in their choice to return *or not return.*

The *McLain* court, though not required, also reviewed whether the move was in the children's best interest.[219] Examining the twelve statutory factors, the court found that Mrs. McLain had not met her burden of proving that the move was in the children's best interest.[220] Placing the burden of demonstrating that the relocation is in the child's best interest on the relocating parent, as opposed to placing the burden on the non-relocating parent, is fraught with complications in the face of a disaster causing such wide-spread re(dis)location as did Hurricane Katrina.

Upon first reading, this case appears to have an absurd result—requiring children to return to a devastated city after they have been forced to relocate even though the new location offers the child a better standard of living.[221] However, the court may have been using denial of relocation as a method of helping to rebuild the city. Repopulating the city was (and still is) a significant part of the rebuilding process. If a judge orders the children to return, then the parents will likely follow. Bringing children and families back to New Orleans is an important goal; however, creating a supportive environment for those families is crucial to increasing their *desire* to return rather than forcing them to return. The trial court judge may have had a larger focus than just "good faith" and the "best interest" of these children. A desire to repopulate and rebuild the city may have shifted the focus of this judge's interest.

In the weeks following the Storm, most residents were not in New Orleans. Many parents were out of the city with children for whom there was no court

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213. *Id.* at 728-29.

214. *Id.* at 729.

215. *Id.* at 730.

216. *Id.* at 735.

217. *See id.* (specifically noting that the move was caused by Hurricane Katrina and that the move did not increase the mother's income).

218. *Id.* at 741.

219. *Id.* at 736-41.

220. *Id.* at 741.

221. *Id.* at 735.

order specifying when a child should be with which parent. If a court order did exist, it likely specified a domiciliary parent (primary physical custodian).[222] Only domiciliary parents are subject to the requirements of the relocation law.[223] In other words, the court does not control or monitor the location or relocation of the non-custodial parent. Traditional relocation law treats the non-custodial parent as free to move out of the area.[224] However, as noted earlier, many children were with their non-custodial parent during the evacuation and continued to stay with that parent weeks, months, and sometimes years after the Storm.[225] In many cases it has been difficult to determine which parent was required to comply with the requirements of the relocation law, as both parents have relocated. The parent who intends to, or eventually does, return to New Orleans can file a petition to have the child returned to New Orleans.[226] However, if neither parent returns to New Orleans, then a Louisiana court could be faced with deciding in which *new* city the child should reside. This has become an increasingly common scenario, triggered by the massive displacement of New Orleanians immediately after the Storm. In these cases, the court must decide with which parent the burden of proving that the relocation is in the child's best interest lies.

In some cases it has been difficult to determine if the action is one for custody determination, modification, or relocation and accordingly with which party the burden of proof lies.[227] This conundrum has been exacerbated since the Storm. For example, Louisiana's relocation laws state that "[p]roviding notice of a proposed relocation of a child shall not constitute a change of circumstance warranting a change of custody."[228] However, "moving *without* prior notice or moving in violation of a court order may constitute a change of circumstances warranting a modification of custody."[229] Applying the statute without flexibility in a post-disaster scenario could trigger this provision. The involuntary move caused by a disaster may instead be treated under the law as a factor in a

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222. *See* LA. REV. STAT. ANN. § 9:335(B)(1) (2008) (noting that when a court issues an order granting joint custody that the court "shall designate a domiciliary parent except when there is an implementation order to the contrary or for other good cause shown"); Evans v. Lungrin, 708 So. 2d 731, 737 (La. 1998) ("[W]hen parties are awarded joint custody, the court must designate a domiciliary parent . . . .").

223. LA. REV. STAT. ANN. § 355.3(A) (Supp. 2009).

224. *See* Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1796-97 (2007) (noting that courts frequently modify visitation for a relocating non-custodial parent).

225. *See supra* notes 174-77 and accompanying text.

226. *See* LA. REV. STAT. ANN. § 9:355.5 (2008) (noting that a relocating party must get a court order before relocating).

227. It is important to note that when the issue of relocation is presented at the initial custody determination hearing, the court applies the same factors as it applies in a relocation hearing to determine if the relocation is in the best interest of the child. *Id.* § 9:355.15.

228. *Id.* § 9:355.11.

229. *Id.* (emphasis added).

modification hearing.

In the face of a disaster such as Hurricane Katrina, courts are called upon to determine what is a relocation, whether a relocation in fact occurred and, if so, when it occurred. Under Louisiana law, if there is a current court order awarding custody, relocation is characterized by the "[*i*]*ntent* to establish legal residence with the child at any location outside of the state [or] more than [150] miles from the domicile of the primary custodian at the time the custody decree was rendered."[230] If there is no court order awarding custody, relocation is characterized by an *intent* to establish legal residence with the child at a distance of more than 150 miles from the other parent.[231]

Because the statute requires intent, it can be difficult to determine when, or if, a relocation took place. Furthermore, under Louisiana law, relocation standards and requirements only apply to a change in residence that will last longer than sixty days, but does not apply to "a temporary absence from the principal residence."[232] In addition, relocation statutes do not apply when "[t]he parents of a child have entered into an express written agreement for a temporary relocation of that child's principal residence, regardless of the duration of the temporary relocation."[233] However, with families dependent upon insurance and Road Home funds, which many families still have not received,[234] to rebuild homes and return to the city, it is difficult to determine when the emergency evacuation ends and the *intent* to relocate begins. Nearly four years after the Storm, some parents still intend to return to New Orleans but have been unable to do so. In the aftermath of a disaster, particularly a disaster on the immense and unprecedented scale of Katrina, it is difficult to determine under traditional legal standards when a parent is an evacuee, involuntarily displaced, or when a parent has voluntarily decided not to return to his/her home.

The law also requires the relocating parent to notify the other parent of the *intent* to establish a new legal residence, spelling out strictly regulated notification requirements.[235] After Katrina, judges were flexible in applying

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230. *Id.* § 9:355.1(4)(a)&(b) (emphasis added).

231. *Id.* 9:355.1(4)(b). Compare to the Indiana statute stating that relocation is a change in primary residence (presumably any change regardless of distance) of an individual (either parent, custodial or non-custodial). IND. CODE § 31-17-2.2-1 (2009); *see also id.* § 31-14-13-10.

232. LA. REV. STAT. § 9:355.1(4)(c) (2008).

233. *Id.* 9:355.2(C)(1).

234. For statistics on Road Home funds, see generally The Road Home News Room, Weekly Detailed Statistics, http://www.road2la.org/newsroom/stats.htm (last visited Aug. 20, 2009) (detailing the number of applicants and number of those receiving funds)).

235. *See* LA. REV. STAT. §§ 9:355.3, :355.4, :355.6 (2008 & Supp. 2009). The law requires that the relocating parent notify the other parent by mail to the last known address of the parent no later than either:

> (1) the sixtieth day before the date of the intended move or proposed relocation[; or]
>
> (2) the tenth day after the date that the parent knows [of the relocation] if the parent did not know and could not reasonably have known the information in sufficient time to

these requirements. Generally, Orleans Parish family law judges did not apply sanctions to potentially relocated parents for the failure to notify the other parent of a relocation after the Storm.[236] However, courts must also address the collateral question of whether the requirement to notify the other parent should take effect if the parent intends to return three, five, or even ten years after the storm.

Generally those who evacuated because of the Storm did not *intend*—or had an idea they would be required—to relocate temporarily or permanently. Nearly four years after the Storm, families are still unable to return to New Orleans for reasons beyond their control and do not know whether they will be able to return even if they intend to do so. Therefore, custody relocation laws, standards, and cases, perhaps more starkly than other areas of family law, have been shaken by the mass displacement and dislocation of hundreds of thousands of parents during Katrina. Judges, lawyers, family law experts, and legislators should review this post-Katrina experience and initiate a process of evaluation and reform of these traditional and, at times, conflicting approaches to relocation in custody cases.

3. Jurisdiction.—Three years after the Storm, estimates suggested that 196,561 fewer people lived in New Orleans than did prior to the Storm.[237] Issues of jurisdiction over families' custody, visitation, and child support matters will likely be felt in courts in Louisiana and across the country for years to come. Jurisdiction over those cases has been and will increasingly become a difficult issue to resolve. However, since the Storm, the legislature has enacted laws and courts have been flexible in an attempt to decrease that difficulty. At least one family law expert noted that in many of the cases he handled the courts would call courts in other jurisdictions to discuss the realities of the situation.[238] These phone calls were vitally important in determining *where* kids actually were and with whom were they living.[239] The conversations helped judges determine the appropriate jurisdiction for each case.[240]

Since Katrina, Louisiana adopted a version of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[241] The Act was introduced in the Louisiana legislature on March 6, 2006, and became effective on August 15, 2007, as a response to the dispersion of Louisiana's citizens after Hurricane

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> comply with the sixty-day notice, and it is not reasonably possible to extend the time for relocation of the child.

Id. § 9:355.4.

236. Judge Landrieu Interview, *supra* note 13; Interview with S. Guy deLaup, President, La. State Bar Assoc. (2007-2008) in New Orleans, La. (May 21, 2008) [hereinafter S. Guy deLaup Interview].

237. LIU ET AL., *supra* note 5, app. at 3, tbl. 1.

238. S. Guy deLaup Interview, *supra* note 236.

239. *Id.*

240. *Id.*

241. LA. REV. STAT. ANN. §§ 13:1801 to :1842 (2009).

Katrina.[242] The Act's goal is to reduce interstate judicial conflict for custody and visitation cases.[243] Prior to the UCCJEA, Louisiana operated under its version of the Uniform Child Custody Jurisdiction Act (UCCJA).[244] Under the UCCJA a parent could move to another state, live there with the child for six months, and the new state could then assert jurisdiction forcing the parent who remained in Louisiana to travel to the new state for custody, visitation, and support hearings.[245] Thus, in adopting the UCCJEA, Louisiana strengthened its ability to retain jurisdiction over its current and former residents.

Under the model UCCJEA, a state retains jurisdiction under the "home state" element if the child lives in that state at the commencement of the initial custody proceeding or the child lived in Louisiana within six months prior to the commencement of the proceeding and the child is currently absent from the state but a parent continues to live in the state.[246] Louisiana adopted this provision.[247] In addition, Louisiana wisely added that Louisiana would have jurisdiction if Louisiana

> had been the child's home state within twelve months before the commencement of the proceeding and the child is absent from the state because he was required to leave or was evacuated due to an emergency or disaster . . . and for unforeseen reasons resulting from the effects of such emergency or disaster was unable to return to [Louisiana] for an extended period of time.[248]

Louisiana also has jurisdiction (1) if another state does not have or has declined jurisdiction, the child and at least one parent has a significant connection in Louisiana other than mere physical presence, and substantial evidence is available in Louisiana "concerning the child's care, protection, training, and personal relationships";[249] (2) all courts that would have jurisdiction have declined jurisdiction on the ground that a court of Louisiana is the more appropriate forum;[250] and (3) no court of any other state would have jurisdiction under the prior two or the "home state."[251] Moreover, Louisiana retains jurisdiction of existing custody and visitation cases unless a Louisiana court determines that the child and both of hisher parents no longer have a significant connection with Louisiana and that "substantial evidence is no longer available in [Louisiana] concerning the child's care, protection, training, and personal

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242. *See* History: HB60-2006 Regular Session (Act 822), http://www.legis.state.la.us/billdata/History.asp?sessionid=06RS&billd=HB60 (last visited June 10, 2009).

243. H.B. 60, Reg. Sess., 2006 La. Sess. Law Serv. 822 (West).

244. *See id.* (noting that the Act's purpose is to repeal the UCCJA).

245. *See* UNIF. CHILD CUSTODY JURISDICTION ACT §§ 3, 13.

246. *See* UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 202.

247. LA. REV. STAT. ANN. § 13:1813(A)(1) (Supp. 2009).

248. *Id.*

249. *Id.* § 13:1813(A)(2).

250. *Id.* § 13:1813(3).

251. *Id.* § 13:1813(4).

relationships" or that the child and both of the child's parents reside outside of Louisiana.[252]

Depending upon the location of each parent and the stage of the family's legal case after Katrina, Louisiana or another state could have jurisdiction over future proceedings. Whether or not a Louisiana court had issued a custody determination prior to the Storm, if both parents return to Louisiana then, of course, Louisiana will have jurisdiction over family law proceedings.[253] In addition, if a Louisiana court had issued a custody determination prior to the Storm and after the Storm, one parent returns to Louisiana, even though the parent with the child does not return to Louisiana, Louisiana will still retain jurisdiction because at least one parent has a significant connection to Louisiana.[254] In the preceding two scenarios, change of custody or relocation issues will continue to be litigated in Louisiana. However, if neither parent returned to Louisiana and the child resides in a state other than Louisiana for twelve months then the state in which the child currently lives could exercise jurisdiction regardless of whether or not a Louisiana court had made a custody determination prior to the Storm.[255] In another scenario, if a petition for paternity or custody had not been filed prior to the Storm and one parent returns to Louisiana and the parent with the child does not return to Louisiana, then Louisiana retains "home state" jurisdiction as long as a petition is filed within twelve months of the last day the child resided in Louisiana."[256] If the parent does not file a petition within twelve months of the last day the child resided in Louisiana, then the state in which the child currently lives can assume jurisdiction.[257]

Before the Louisiana legislature enacted the UCCJEA, Louisiana was more likely to lose jurisdiction of family law cases in the face of a disaster causing wide-spread dispersal of residents. The UCCJEA provides better protection for children, especially if enacted pre-disaster, by creating consistency in the legal process and court decisions. A judge who is familiar with the case and the family history can issue rulings which better protect a child than a judge who is unfamiliar with the family history. A judge who has family familiarity can better determine the impact post-disaster circumstances will have on the child. Only when the child and both parents cease to have significant connections to Louisiana does that state lose jurisdiction over a continuing family law case.

E. Child Support

The hurricane caused widespread unemployment.[258] Many businesses did not re-open in New Orleans after the Storm. Additionally, most residents

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252. *Id.* § 13:1814.
253. *See id.* § 13:1813(A)(1).
254. *Id.* § 1813(A)(1) & (2).
255. *See id.*
256. *See id.* § 1813(A)(1).
257. *See id.*
258. *See* LIU ET AL., *supra* note 5, at app. 31, tbl. 26 (reporting unemployment rates).

experienced some loss of income due to the hurricane.[259] Parents who experienced a loss of income and had child support obligations likely had difficulties meeting those obligations. At the same time, parents who experienced a loss of income and receive child support were in need of additional support for the child. In addition to decreased income, many families concurrently experienced an increase in expenses.[260] Recalculating child support obligations became a necessary and difficult matter for courts not only in Louisiana but also in other states to which New Orleanians had relocated.[261]

Post-Katrina, the Louisiana courts and legislature tend to be cautious but flexible. The Louisiana legislature held a special session in November 2005.[262] During this special session, child support statutes were modified to exclude most disaster assistance benefits from parents' income calculation[263] and to create flexibility in child support calculations by allowing additional deviations from the child support guidelines.[264]

Courts did not want children to suffer the loss of financial support but also did not want to impose an unreasonable obligation on parents paying child support.[265] Judge Madeleine Landrieu stated that she recognized, for some parents, meeting child support obligations caused debt collections issues and even bankruptcy for the payor parent.[266]

However, the unique circumstances of post-Katrina Louisiana made finding the balance between providing the same pre-Storm standard of living for children

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259. *See id.* at app. 48, tbl. 33 (reporting a decrease in personal annual income for 2005).

260. *See supra* text accompanying notes 136-44 and accompanying text.

261. For example, Arkansas responded to the concern that non-custodial parents from hurricane affected areas might not be able to meet their child support obligations by offering to review and modify orders that were issued in Arkansas. *See* Lane, *supra* note 176, at 440-41 (citing Press Release, Ark. Dep't of Fin. & Admin., Child Support Enforcement Assistance to Those Whose Child Support Services May Have Been Affected by Hurricane Katrina (Sept. 1, 2005), *available at* http://www.arkansas.gov/dfa/documents/pr1.DOC.

262. *See* 2005 1st Extraordinary Legislative Session, http://www.legis.state.la.us/archive/051es.htm (last visited June 10, 2009).

263. *See* LA. REV. STAT. ANN. § 9:315(C)(3)(d)(v) (2008) (stating that gross income does not include "any disaster assistance benefits received from the Federal Emergency Management Agency through its Individuals and Households Program or from any other nonprofit organization qualified as a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1954, as amended").

264. *Id.* § 9:315.1(B)(2) ("Notwithstanding the provisions of Paragraph (1), as a direct result of either Hurricane Katrina or Rita, the court may deviate from the guidelines set forth in this Part if the application of the guidelines would not be in the best interest of the child or would be unjust, inequitable, or cause undue hardship to the parties. In determining the amount of the child support, the court may also consider that the parties may have been prevented from timely access to the courts for the exercise of their legal rights. However, the amount of the deviation shall not exceed the consideration the court would have given if the party were able to timely access the court.").

265. S. Guy deLaup Interview, *supra* note 236; Judge Landrieu Interview, *supra* note 13.

266. Judge Landrieu Interview, *supra* note 13.

and imposing unreasonable obligations on payors difficult. In *Langley v. Langley*[267] a New Orleans court denied a father's request for child support reduction.[268] The court ruled that the father, Dr. Langley, was "voluntary underemployed" and could be earning the income that he earned prior to the hurricane.[269] Dr. Langley had been a physician at Methodist Hospital in New Orleans prior to the hurricane.[270] After the hurricane, Methodist Hospital did not re-open and Dr. Langley obtained a position at a hospital in Beaumont, Texas.[271]

Subsequently, Dr. Langley decided to return to Louisiana and obtained another position at a facility in West Monroe, Louisiana.[272] This new position earned Dr. Langley significantly less than he had previously earned both prior to the Storm in Louisiana and after the Storm in Texas.[273] Dr. Langley requested a reduction in his child support obligation based on his actual income and based on the recently enacted statute.[274] The statute states that "a party shall not be deemed voluntarily . . . underemployed if he or she has been temporarily . . . forced to take a lower paying job as a direct result of Hurricane Katrina or Rita."[275] However, the court held that Dr. Langley's abandonment of a position in Texas did not constitute his being temporarily forced to take a lower paying job as a direct result of Hurricane Katrina.[276] Thus, the court imposed not only a specified dollar amount but also appeared to be imposing a location or type of work obligation on the child support payor. Under this court's order, Dr. Langley must find employment earning at least as much as the income he earned prior to the Storm even though his former employer does not exist and is, therefore, not an option as a source of income.[277] The Storm caused massive shifts in income and earning potential for New Orleanians. Pre-Storm residents now are struggling with relocation, re-employment, and meeting child support obligations in the post-Storm chaos.

F. The Legal Rights of Non-traditional, Same-sex Families in the Face of Disasters

Non-traditional families, specifically families headed by same-sex couples, and single-parent lesbian or gay families face additional risks and legal complications when disaster strikes. In recent years, state courts and legislatures around the country, responding to public opinion and social pressures from all

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267. 982 So. 2d 881 (La. Ct. App. 2008).

268. *Id.* at 887 (affirming the lower court's order not lowering child support).

269. *Id.* at 883.

270. *Id.* at 883-85.

271. *Id.* at 884.

272. *Id.*

273. *Id.*

274. *Id.*

275. LA. REV. STAT. ANN. § 9:315.11(C) (Supp. 2009).

276. *Langley*, 982 So. 2d at 884.

277. *See id.* at 884-85 (noting that a wage earned prior to underemployment is "the best estimate of earning potential").

sides, have been grappling with the question of how the law should treat same-sex couples in committed relationships, as well as their children.[278] While a full analysis and survey of these issues is beyond the scope of this Article, it is nonetheless important to include some discussion of this issue within the broader analysis of how Katrina has impacted family law and families.

In the majority of the states, disaster and emergency planning, along with recovery law and policies, are likely to take a traditional view of who is a family and who is not. Legislators will more likely than not rely on a nuclear family model in crafting this area of disaster family law and policy. Furthermore, the federal government does not recognize same-sex relationships for purposes of marriage, nor any government benefits, programs, or taxes.[279] This can have a serious and deleterious effect on those families that do not fit the nuclear family mold. Indeed, not only same-sex headed families would be affected by a narrow view of the family unit. Families headed by a single-parent who identifies as heterosexual could also find themselves at risk of legal protections in the face of disaster.

In general, how non-traditional families will fare under disaster recovery and relief programs in the aftermath of a tragedy depends on how the family law of that jurisdiction treated these families and relationships before the disaster. As with all areas of domestic relations, the law differs widely from state jurisdiction to jurisdiction. In those jurisdictions that recognize same-sex civil unions or domestic partnerships,[280] relief programs, as well as legal issues concerning children of the relationship likely would provide the greatest protections for the family. On the other side, in those jurisdictions that do not recognize civil unions or domestic partnerships, uncertainty and rejection of familial rights likely will characterize the way in which recovery programs treat the relationship or family. In those jurisdictions where same-sex civil marriage is legally recognized, the families of course will have the greatest protections in the wake of a disaster. In those jurisdictions, same-sex married couples should be treated with the same rights and obligations as in all marital units.[281] Their children would also be as

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278. For a thorough survey and analysis of how same-sex and other non-traditional families have been treated by disaster recovery programs in the wake of a disaster, *see* Goldfarb, *supra* note 99, at 39-43. Goldfarb focuses on the September 11th Victim Compensation Fund of 2001, in the aftermath of the attacks on the World Trade Center and the Pentagon on September 11, 2001. *Id.*

279. *See* Federal Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2006). Additionally, federal statute alleges that the Constitution's Full Faith and Credit Claus does not apply to state marriage laws recognizing same-sex marriage. Federal Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (2006).

280. Although now constantly being updated and evolving, for a list of states recognizing same-sex civil unions, see D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 181 (3d ed. 2006) (noting District of Columbia, Hawaii, and New Jersey as among those states recognizing same-sex civil unions).

281. Currently in the United States, same-sex marriage is expressly recognized in six states. These states are: (1) Massachusetts, *see* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); (2) Iowa, *see* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); (3) Vermont, *see* S. 115, §

fully protected as possible under the law, should a disaster strike.

An issue of great importance to non-traditional couples in the wake of a disaster is whether relief programs will recognize the surviving partner as the legal spouse for purposes of benefits and other relief. For those couples who have children, issues of child custody relocation, cross-adoption by both parents, and related matters will likely rise to the fore in the wake of a disaster, particularly if one of the adults dies or is severely injured in the disaster. Same-sex couples who did not cross-adopt their minor children before a disaster will face legal obstacles afterwards. If the family is separated, displaced or decides later to dissolve their relationship, they will face additional legal challenges and few protections under the law.

The State of Louisiana does not provide any legal protections or recognition of same-sex couples, nor of children who are being parented by a same-sex couple.[282] Louisiana has not adopted domestic partnerships or civil unions, however in some parishes, most notably Orleans Parish, some family law courts have allowed adults in a same-sex committed relationship to co-adopt children.

In Louisiana and other states that provide no legal protections for same-sex couples and same-sex couples with children, these families should make preparations to protect their rights to property and certainly to their children before disaster occurs. Non-traditional families should implement their own disaster preparation planning by utilizing and putting in place available non-marital legal mechanisms. These include powers of attorney, wills and child custody agreements that protect their children and chosen families.

CONCLUSION

The long-term consequences of Katrina on the families of New Orleans, and particularly on the women and children who survived the Storm, surely will last for years and be unprecedented in scope. Concrete statistical data, monitoring, reports, and other analysis of how the families of New Orleans have been affected to date has been woefully sparse. Despite this limitation, we have attempted to describe the current impact and to project what will be the long-term consequences of Katrina on families and family law. We have done this through the perspective of Katrina's impact on women and children first, as they have been the most vulnerable victims of the storm and are the core of the city's social

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8, 2009-2010 Leg., Reg. Sess. (Vt. 2009) (to be codified at VT. STAT. ANN. tit. 15, § 8) (legalizing same-sex marriage as of September 1, 2009); (4) Connecticut, *see* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); (5) Maine, *see* L.D. 1020, 124th Leg., 1st Reg. Sess. (Me. 2009) (to be codified at ME. REV. STAT. ANN. tit. 19-A, § 650-A) (recognizing same-sex marriage by statute effective in September 2009); and (6) New Hampshire, *see* H.B. 436-FN-LOCAL, 2009 Leg., 1st Reg. Sess. (N.H. 2009) (to be codified at N.H. REV. STAT. ANN. § 457:1) (effective January 1, 2010).

282. *See, e.g.*, Forum for Equality PAC v. McKeithen, 893 So. 2d 715 (La. 2005) (holding that the amendment to the state constitution that prohibits same-sex marriage did not itself violate the constitution); *see also* LA. CONST. art. 12, § 15 ("Marriage in the state of Louisiana shall consist of the union of one man and one woman.").

fabric, its life, and certainly its future.

While the Orleans Parish courts did what they could in the face of this all engulfing tragedy, in the future courts and judges across the nation should aim to be deliberate and empathetic in flexibly applying existing family laws in the wake of a disaster. They should plan on closely collaborating with social service and relief agencies during and after the disaster. Legislatures should also plan ahead for such a crisis that necessarily will involve the judicial system. They should prepare now, before a disaster strikes, by promulgating laws that respect family structures and diversity, both traditional and non-traditional. These legal protections should apply to families across a broad and diverse spectrum of familial arrangements.

In addition, courts should be prepared to respond quickly when called upon in the midst of chaos and dislocation of the populace. Family law courts in particular can play a crucial role by being flexible with their pending proceedings, supporting displaced families, and minimizing adversarial stances and communications by encouraging mediation. In an environment of crisis and displacement, where parties are already suffering and traumatized, courts should attempt to encourage family reunification and communication and promote a return to normalcy and rebuilding.

Within this Article, we have challenged the traditional role of family law and the courts as guardians of the status quo within an essentially adversarial paradigm. Instead, we have tried to show that particularly when social support systems fail and become dysfunctional during a crisis, that family law courts can play a unique and important role as a supportive catalyst for families to pull together, rather than pull apart. Indeed, in New Orleans family law and the courts can and should serve as a part of the healing and restorative process for the thousands of families who have returned home to New Orleans, and those who are still in the midst of the recovery process.

Family law and the courts both in New Orleans and the surrounding parishes are facing unique challenges. They are attempting to unravel the complex scenarios that have arisen due to the continued displacement and separation of families, particularly those still in the Katrina Diaspora, located in cities across the country. Louisiana State family law and the family law courts should affirmatively protect the families with children who are still displaced in the Katrina Diaspora. These displaced families need special assistance and advocacy, sensitive to their needs, so that they can return to New Orleans, rebuild their lives and their homes, and secure a safe, healthy, and secure future for their children. To ultimately accomplish this goal will also require federal intervention in the form of financial assistance, additional legal protections, and federally led recovery efforts and programs that do not yet exist. In so doing, disaster family law and the courts can help to bring a measure of social justice to Katrina survivor families in the face of this unprecedented disaster.